REPORT

ON

COMPENSATION FOR PERSONAL INJURIES AND DEATH

ONTARIO LAW REFORM COMMISSION

Ministry of the
Attorney
General

1987

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The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions. The Commissioners are:

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ISBN 0-7729-3319-7

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Ontario
Law Reform
Commission

The Honourable Ian G. Scott, QC
Attorney General for Ontario

Dear Mr. Attorney:

We have the honour to submit herewith our *Report on Compensation for Personal Injuries and Death*.

FOREWORD

In November, 1985, the Commission added to its program a Project on Compensation for Personal Injuries and Death, and appointed Professor Stephen M. Waddams, of the Faculty of Law, University of Toronto, as Project Director. In order to assess the utility of existing legal principles governing the assessment of compensation for personal injuries and death, the Commission engaged the services of a Research Team to prepare research papers on various topics in the area. In addition to the Project Director, the members of the Research Team were Professor Gordon Bale, of the Faculty of Law, Queen's University; Professor J. Bruce Dunlop, of the Faculty of Law, University of Toronto; Professor Bruce Feldthusen, of the Faculty of Law, University of Western Ontario; Professor Samuel Rea, Jr., of the Faculty of Law, Department of Economics, and the Institute for Policy Analysis, University of Toronto; and Professor Denise G. Reaume, of the Faculty of Law, University of Toronto. The Research Team prepared a number of papers[1] dealing with pre-trial losses; non-pecuniary loss, including compensation for loss of guidance, care, and companionship under the *Family Law Act, 1986*,[2] and monetary limits on non-pecuniary loss; loss of future earning capacity in the case of injury to, and death of, wage earners and non-wage earners; future care costs; collateral benefits; exemplary damages; prejudgment interest; income tax considerations; and periodic payments and structured settlements.

In view of the great public importance of the subject matter of this Report, the Commission has endeavoured to consult widely with academics, practising lawyers, liability insurance experts, and representatives of other sectors of the community affected by the subject matter of our Project. In the initial stage of the Project, we published a Notice inviting submissions from persons interested in the operation of this area of the law.

The Commission also appointed an Advisory Committee, comprising members of the judiciary and the practising profession, as well as representatives of government and the insurance industry. The members of the Advisory Committee were: the Honourable Mr. Justice S.L. Robins, of the Court of Appeal for Ontario; the Honourable Mr. Justice W.D. Griffiths, of the High Court of Justice for Ontario; Mr. T.P.D. Bates, Barrister and Solicitor, Toronto; Mr. E.W.G. Chick, Senior Executive—Claims, Royal Insurance Canada, Toronto; Mr. Kenneth E. Howie, Q.C., Barrister and Solicitor, Toronto; Mr. John L. Lyndon, President and Chief Executive Officer, Insurance Bureau of Canada, Toronto; Mr. Barry A. Percival, Q.C., Barrister and Solicitor, Toronto; Mr. Reno A. Stradiotto, Q.C., Barrister and

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[1] The research papers are listed in Appendix 6 to this Report. It is proposed to deposit the research papers in the Legislative Library of Ontario.

[2] *Family Law Act, 1986*, S.O. 1986, c. 4, Part V.

Solicitor, Toronto; Mr. Bruce A. Thomas, Q.C., Barrister and Solicitor, Toronto; Mr. Herman Turkstra, Barrister and Solicitor, Hamilton; and Mr. John P. Weir, Superintendent of Insurance, Province of Ontario, Toronto. Early in 1987, the Advisory Committee met on a number of occasions to consider the research papers prepared by the Research Team.

At a later stage of the Project a Subcommittee, comprising members and representatives of the Commission as well as Mr. Justice Griffiths and Mr. Stradiotto of the Advisory Committee, was struck to consider proposals for the standardization of assumptions underlying the calculation of gross-up. The Commission also sought the help of four experienced actuaries, who were asked to assess the reasonableness of the proposed assumptions. Accordingly, a submission to us was drafted by Mr. Paul Winokur, Consulting Actuary, Actrex Partners Ltd., Toronto; Mr. Murray Segal, Consulting Actuary, Eckler Partners Ltd., Don Mills; Mr. Robert E. Collins, Consulting Actuary, Robert E. Collins Actuarial Services Ltd., Mississauga; and Mr. H. Wayne Woods, Consulting Actuary, M.L.H. & A. Inc., Ottawa.

The Commission wishes to express its gratitude to the Project Director, the Research Team, and the Advisory Committee for their invaluable contributions throughout the various stages of this Project, as well as to the consulting actuaries, mentioned above, and to those other persons who took the time and effort to make submissions to us or to offer us advice on various issues. In particular, we wish to acknowledge the contribution of the Project Director, Professor Stephen Waddams, whose understanding of this critically important field is both comprehensive and profound. We also wish to express our special thanks to Professor Samuel Rea, Jr., on whose expertise we relied on a great number of occasions, and to Mr. Arthur Stone, Q.C., former Senior Legislative Counsel, who prepared the draft legislation that accompanies this Report.

CHAPTER 1

INTRODUCTION

There has been considerable public interest, particularly heightened in the past two years, in the subject of compensation for personal injuries and death. It is important, therefore, to indicate the scope of our study and its relationship with other studies conducted by the Commission and other bodies.

The Commission's purpose in initiating the Project was to take a careful and balanced look at the legal principles governing the assessment of compensation for personal injuries and death, with the object of ensuring that such principles should be fair, reasonable, and consistent. It bears emphasizing at the outset that the commencement of the Project was not linked with any perceived crisis in the operation of the existing tort system, or, more specifically, with any perception of a so-called "insurance crisis". The Project Director was asked to assume, for the purposes of the Project, the continued existence of the present system of individual responsibility of wrongdoers for losses caused by injuries; thus, consideration of radical reform, such as replacing the tort system by a system of first party liability insurance, was excluded from the Project's terms of reference. The Project Director was also instructed to exclude consideration of workers' compensation and of no-fault automobile insurance benefits.

In January, 1986, the Government of Ontario established a Task Force on Insurance, chaired by Mr. David W. Slater. The Task Force reported in May, 1986.[1] The Report dealt, briefly, with some proposals for change in the law that fall within the scope of the Commission's present Project, and, in fact, referred specifically to the Commission's Project, recommending that it should be accelerated.[2] The Commission, recognizing the urgency of reporting on the subject, did proceed to advance the timetable for completion of the Project.

One of the recommendations of the Task Force was that consideration should be given to the establishment of a "no-fault" first party insurance scheme of compensation for automobile injuries. Following on this proposal, a single judge, the Honourable Mr. Justice Coulter Osborne, of the High Court of Justice for Ontario, was appointed in the fall of 1986 as a

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[1] Ontario, *Final Report of the Ontario Task Force on Insurance* (1986) (hereinafter referred to as "Task Force Report").

[2] *Ibid.*, at 60.

Commissioner to make recommendations on the subject of automobile insurance.

In some respects, Mr. Justice Osborne's terms of reference go beyond the scope of the Commission's Project, in that they include the possibility of the replacement of tort law by a system of first party insurance. In other respects, however, Mr. Justice Osborne's terms of reference are narrower, since they are confined to motor vehicle accidents. Thus, however Mr. Justice Osborne reports, and whatever action is taken as a result, there will still be a need to ensure that the principles governing the assessment of compensation for personal injuries and death outside the field of automobile accidents are satisfactory.

It was said earlier that the object of the present study was to assess the present utility of these principles in order to determine whether they were fair, reasonable, and consistent. These criteria necessarily imply that the interests of both plaintiffs and defendants must be dispassionately considered and equally protected.

It bears emphasizing that often the defendant is a "wrongdoer" only in a technical legal sense. Strict liability is imposed on the small retailer for injuries caused by defects in products that could not possibly have been foreseen or prevented.[3] In some cases, the burden of disproving negligence rests on the defendant, who may, therefore, be held liable without affirmative proof of fault by the plaintiff.[4] In other cases, a person may be held liable for the negligence of another, notwithstanding the absence of any personal fault. For example, liability may be imposed on the owner of an automobile for injury caused by a person driving with his consent.[5] Even where liability is based on the fault of the defendant, that fault may consist of a momentary inattention that could not be considered morally blameworthy. Furthermore, there is no necessary relationship between the degree of fault and the extent of the damage. A morally blameless act may cause a loss of several million dollars, while a shocking case of reckless conduct may cause only very slight damage. Since, therefore, each of us runs the risk of being held liable in one or more of the circumstances just described, we all have an interest in seeing that the principles governing compensation are fair and balanced from all points of view.

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[3] In such cases, liability is based on breach of warranty, and is, therefore, contractual. It is convenient at times to speak of "tort liability" or the "tort system" to refer to all liability for personal injuries; but it should be borne in mind that liability may equally be based on breach of contract.

[4] One example is s. 167(1) of the *Highway Traffic Act*, R.S.O. 1980, c. 198, which places the onus of disproving negligence on the owner or driver of a motor vehicle (except in cases of collision between motor vehicles and in certain other cases, as provided for in s. 167(2)). Another example is s. 68 of the *Family Law Act, 1986*, S.O. 1986, c. 4, which, in an action against a parent for personal injury or death caused by the fault or neglect of a child who is a minor, places the onus of establishing that the parent exercised reasonable supervision and control of the child on the parent.

[5] *Highway Traffic Act*, *supra*, note 4, s. 166.

While, as we have said, the Commission's Project was not a response to any kind of perceived insurance crisis, and while the object of our study cannot simply be the reduction of insurance premiums by means of reform of the tort system, the impact of liability insurance, and particularly the events of the past two years, clearly cannot be ignored.

The impact of liability insurance is, however, ambiguous. It has very often been said, expressly or impliedly, that since liability is borne by insurers, concern for the interest of defendants is misplaced. On the other hand, recent events have brought home the truth that the existence of liability insurance does not cause the cost of liability to disappear. Moreover, the insurance crisis has emphasized the point that the costs of resolving disputes—which include the costs of establishing, proving, and defending claims, both in and out of court—must be added to the total cost of liability. This cost is usually passed on to a wide section of the public in the form of increased liability insurance premiums, increased taxes, or an increase in the cost of goods or services. Litigation, as many have noted, burdens not only defendants, but also plaintiffs.[6] There may, of course, be arguments that support the spreading of losses over a wide section of the public, but these arguments do not support giving extravagant compensation, at public expense, to those who suffer personal injury. Accordingly, it is in the interests of the whole community to keep the costs of resolving disputes as low as is consistent with other important objectives.

The actual costs of resolving disputes and compensating injured persons are not the only factors influencing the size of insurance premiums. Predictability, too, is important from an insurance standpoint. Unpredictability of awards adds to the cost of insurance.

The considerations discussed above do not lead to obvious conclusions in respect of particular issues. They do, however, offer an important perspective from which it is possible to conclude, first, that, whatever the merits of theories of loss spreading, the principles governing the assessment of compensation must be fair to both plaintiffs and defendants, and, secondly, that the attempt to give full compensation to the injured party must be tempered by the need to establish principles that are predictable and not excessively costly in application.

Many commentators have remarked that the liability insurance system, combined with an expansive view of liability, have been operating during the last fifty years or so as a sort of half-formed accident compensation scheme.[7] Though liability may depend on fault, it has been suggested

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[6] See, for example, O'Connell and Kelly, *The Blame Game* (1987), at 99.

[7] See, for example, Fleming, *The Law of Torts* (5th ed., 1977), at 11-12. Fleming states as follows: "The 'official line' no doubt still is that insurance is contingent on liability, not vice versa, and therefore irrelevant to the tort issue. In practice, however, it is an influential factor even when hidden, though indeed nowadays increasingly brought out

that judges have sometimes been willing to find fault, occasionally on slender evidence, where compensation seems desirable.[8] As this process advances, it is said, the tort system has come under obvious strain. There is a gap between the declared purposes of the law and its actual function; cases where liability (and, therefore, compensation) is denied have come to seem increasingly anomalous as the absence of fault on the part of the defendant is perceived to be an untenable reason for such denial.[9] Any difficulties to which these tensions may have given rise cannot, however, be resolved within the boundaries of the present Project, which deals with principles governing the assessment of compensation.

There has been considerable debate concerning whether the purposes of tort law include a deterrent function and, if so, how that function ought to affect the rules respecting the assessment of compensation for personal injuries and death. Many commentators have argued that the deterrent effect of tort law is important as a means of affecting the behaviour of individuals, or as a means of attributing to activities their full social cost.[10] On some matters, to be discussed later in this Report, this issue may be significant, but it does not lead to any clear conclusion concerning the principles to govern the measurement of compensation. While a legitimate function of the law is to affect the behaviour of defendants, compensation in individual cases must still be measured with due regard to the interests of both parties. An economic approach to the deterrent function of tort law requires that the wrongdoer should pay the amount of the plaintiff's loss, neither more or less. Balanced and equitable principles are needed to assess this loss, just as under any other theory concerning the purpose of tort law.

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into the open. Without it, one could neither explain nor justify the pervasive trend towards strict(er) liability which runs like a golden thread throughout this textbook". (*Ibid.*, at 12.)

[8] See the discussion in Task Force Report, *supra*, note 1, at 61-63. The Report referred to a speech by Mr. Justice Horace Krever, of the Ontario Court of Appeal, reported in *Ontario Lawyers Weekly*, Vol. 5, No. 39 (February 21, 1986), at 24. In his speech, Mr. Justice Krever commented on the unfairness and incoherence of the present fault-based tort system and on the "intellectual dishonesty" that it often breeds. See, further, *infra*, note 9.

In response to Mr. Justice Krever, see the remarks of Mr. Justice Montgomery, reported in *The Lawyers Weekly*, Vol. 6, No. 13 (July 25, 1986), at 10. Mr. Justice Montgomery stated that he did not share the views expressed by Mr. Justice Krever.

[9] See the comments of Krever J. in *Ferguson v. Hamilton Civic Hospitals* (1983), 40 O.R. (2d) 577, at 618-19, 144 D.L.R. (3d) 214 (H.C.J.): "I confess to a feeling of discomfort over a state of affairs, in an enlightened and compassionate society, in which a patient who undergoes a necessary procedure and who cannot afford to bear the entire loss, through no fault of his and reposing full confidence in our system of medical care, suffers catastrophic disability but is not entitled to be compensated because of the absence of fault on the part of those involved in his care". The decision was affirmed (1985), 50 O.R. (2d) 754, 18 D.L.R. (4th) 638 (C.A.) (subsequent reference is to 50 O.R. (2d)). The Court stated (at 755): "We agree that in situations such as the instant one, 'an enlightened and compassionate society', to use the words of the learned trial judge, should do more".

[10] See, for example, Posner, *Economic Analysis of Law* (3d ed., 1986), at 187-91.

Traditionally, the primary function attributed to damages in tort law is to put right, so far as money can do so, the wrong caused by the defendant. The most widely quoted statement of the measure of damages is that of Lord Blackburn in *Livingstone v. Rawyards Coal Co.*:[11]

> I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

In no sphere of the law of damages has this principle been found to be self-applying. Even where the loss is solely a commercial one, difficulties constantly arise. Over thirty years before Lord Blackburn made the statement just quoted, Dr. Lushington said, in a case involving a ship collision:[12]

> The general rule of law is, that...the party receiving the injury is entitled to an indemnity for the same. But although this is the general principle of law, all Courts have found it necessary to adopt certain rules for the application of it; and it is utterly impossible, in all the various cases that may arise, that the remedy which the law may give should always be the precise amount of the loss or injury sustained. In many cases it will, of necessity, exceed, in others fall short of the precise amount.

Even more difficult is the task in cases involving personal injuries, where money can only be a very poor substitute for what has been lost. Throughout the law of damages there is a perpetual tension between, on the one hand, the search for perfect compensation, and, on the other hand, the recognition that the goal of perfect compensation is illusory. It has been conceded in many cases, explicitly or by implication, that, for the sake of consistency and for the saving of the time and expense of an inquiry into remote hypotheses in every individual case, certain rules of damage assessment must be adopted.

As has been explained, the scope of the present study does not extend to the examination of systems of accident compensation other than the present system founded on the individual responsibility of wrongdoers. Nor does our study seek to measure the existing system against various possible alternatives to it. But it should be emphasized that all such alternative systems have been very vigorously attacked by their critics. While, therefore, we cannot say that the present regime is better than any one alternative, we do wish to make the point again that, in an imperfect world, *all* systems fall short of perfection. Since an ideal solution to the problem of accident compensation is not likely to be forthcoming, what must be sought is the

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[11] (1880), 5 App. Cas. 25 (H.L.), at 39.

[12] *The Columbus* (1849), 3 W. Rob. 158, 166 E.R. 922, at 923 (Adm.).

proper balance between, on the one hand, a comprehensive inquiry in each individual case into precisely what the plaintiff has lost, and, on the other hand, principles that are capable of fair, consistent, and reasonably inexpensive and expeditious application.

Although the future of the tort system of liability for personal injuries and death is not within the scope of this study, the importance of the question of damages to the current debate cannot be doubted. Much of the criticism of the tort system in American jurisdictions rests, expressly or impliedly, on the supposition that some plaintiffs receive excessive awards, and that the chance of obtaining very high awards colours the settlement process. If critics of the tort system were convinced that awards would never exceed a fair and moderate assessment of actual losses, some (but not all) of their arguments would be seriously weakened. This Commission, in recommending, eight years ago, the extension of liability of suppliers of defective products, did so in the expectation, expressly stated, that Canadian courts were not likely to accept the large and unpredictable awards common in some American jurisdictions.[13]

Much publicity has been given to large awards in individual cases, particularly to two awards, one, subsequently reversed on appeal, of $6.3 million to a quadriplegic[14] and the other, still under appeal, of $3.7 million to a child for the loss of a forearm.[15] There is a widespread impression not only that a significant number of damage awards are excessive, but also that the size of such awards has been increasing dramatically. The latter belief is supported to some extent by recent studies.

For example, the Ontario Task Force on Insurance commissioned a study of automobile personal injury claims, which found the average yearly increase from 1976 to 1984 to be seven percent above the rate of inflation. The study stated that "it is impossible to prove statistically: (a) whether general damages for comparable injuries have increased losses and, if so, at what rate; and, (b) to what extent new categories for recovery have increased losses".[16]

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[13] Ontario Law Reform Commission, *Report on Products Liability* (1979), at 74-76.

[14] *McErlean v. Sarel* (1985), 32 C.C.L.T. 199 (Ont. H.C.J.), rev'd unreported (September 29, 1987, Ont. C.A.). Although the Court of Appeal reversed the decision of the lower court on the question of liability, it also commented on the assessment of damages. It stated that, if it had found the defendant liable, it would have altered the award of the trial judge to $3,689,435.

[15] *Giannone v. Weinberg* (1986), 37 C.C.L.T. 52 (Ont. H.C.J.).

[16] The Wyatt Company and Cassels, Brock & Blackwell, *Report to the Task Force on Insurance on the Ontario Private Passenger Automobile Bodily Injury Claims Study (IBC Data Base)* (April 17, 1986), Appendix 11 to the Task Force Report, *supra*, note 1, 309, at 312. The "losses" to which reference is made refer to "the costs of claims arising from bodily injury" (*ibid.*, at 311).

Figures published by Statistics Canada show an increase in the dollar value of claims paid and payable in non-automobile liability cases from $183,827,000, in 1980,

In another study,[17] a commentator recalculated the award approved by the Supreme Court of Canada in *Andrews v. Grand & Toy Alberta Ltd.*[18]—one of the so-called "trilogy" of cases decided by that Court in 1978[19]—assuming similar facts requiring an assessment of damages in each of the years between 1978 and 1986. It was estimated that the award would have risen from $896,147, in 1978, to $3,731,871, in 1986, an increase of 316 percent during a period when prices increased by only 84 percent. However, no suggestion was made that obvious conclusions could readily be drawn from these figures. Increases in damages awarded were due, in part, to the correction of what is now recognized to have been a wrong discount rate used by the Supreme Court of Canada in the trilogy.[20] In part, the increase was due to the allowance of prejudgment interest, which is generally agreed to be properly payable to the plaintiff. Increases in levels of awards might well indicate, then, that they were formerly inadequate or incorrectly calculated. Another plausible explanation for such increases is that sophisticated, and expensive, medical techniques now prolong the lives of plaintiffs who would formerly have died early, and offer opportunities of palliative and rehabilitative treatment that were formerly lacking. It cannot be

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to $602,294,000, in 1986. See Statistics Canada, Financial Institutions, Financial Statistics, Catalogue 61-006 (Quarterly). However, it cannot be deduced from these figures that comparable cases are necessarily producing increasingly higher awards and settlements over the years. For example, it may be that a larger number of persons are being held liable today. In addition, it seems likely that more sophisticated medical techniques, which may be more costly, are being used to a far greater extent, particularly in order to prolong the lives of those injury victims who would not have survived before.

More significant are figures from the Canadian Medical Protective Association, showing an increase in the average damage award, paid by the Association, from $7,700 in 1970 to $88,000 in 1984, and a rise in premiums for the highest risk group of physicians from $500 in 1983 to $8,200 in 1987. (The foregoing figures are taken from two papers presented at the Canadian Institute for the Administration of Justice, National Seminar on Professional Liability (October 29 - November 1, 1986), by C.G. Ferguson, Barrister and Solicitor, Halifax, and J. O'Brien-Bell, President, British Columbia Medical Association: see Ferguson, at 1, and O'Brien-Bell, at 2.)

In another study, Professor Samuel Rea, Jr., found that, between 1978 and 1985, the average cost of claims in the automobile field had increased 58% more than the rate of inflation: Rea, "Economic Perspectives on the Liability Insurance Crisis", an unpublished paper to appear in Law Society of Upper Canada, *Special Lectures of the Law Society of Upper Canada 1987* (1987).

[17] Rea, *ibid.*

[18] [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452 (subsequent reference is to [1978] 2 S.C.R.).

[19] In addition to *Andrews*, *ibid.*, see *Arnold v. Teno*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609, and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480. The trilogy will be referred to later in this Report.

[20] The present practice of awarding damages for future pecuniary loss (that is, loss of earning capacity and the cost of care) involves a determination of the present value of the loss. Since the plaintiff will receive the lump sum award immediately and will earn interest on it, the amount must be discounted to avoid overcompensation. See *infra*, ch. 8, sec. 2.

deduced from the rate of increase or the present level of awards that any impropriety or distortion has occurred in the assessment of damages.[21]

It is suggested, therefore, that caution must be used in drawing conclusions merely from the rate at which awards have increased. Nor can reform of the law of damages be supported simply on the ground that awards generally are too high, even aside from their rate of increase. Rather, reform must rest on the independent merits of the various arguments adduced in support of it.

Before outlining generally the topics canvassed in each of the chapters of this Report, mention should be made of the classification of damages awarded to a plaintiff for personal injuries or death. Damages in favour of an injured person or her estate are awarded under various categories, or "heads".[22] While the terminology is not entirely consistent in all cases, the separate heads of damages endorsed by the Supreme Court of Canada in the trilogy[23] are as follows: (1) special damages; (2) prospective loss of earnings or profits; (3) cost of future care, that is, medical and rehabilitative treatment; and (4) non-pecuniary loss, that is, pain and suffering, loss of amenities (or loss of enjoyment of life), and loss of (or shortened) expectation of life. The first three categories involve compensation for pecuniary loss,[24] while the last category involves compensation for non-pecuniary loss.

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[21] Another study, by Eric Keen, an Actuarial Assistant at the Mercantile and General Reinsurance Company of Canada, Toronto, indicated the "average court awards by region across Canada for five 11-month periods from September 1981 through March 1986". The source of the data was cases reported in the Canadian Insurance Law Reports. For Ontario, Mr. Keen found that, excluding claims exceeding $1 million, "General Damages", "Non-Pecuniary" damages (including awards to relatives under the *Family Law Reform Act*, R.S.O. 1980, c. 152, now the *Family Law Act, 1986*, *supra*, note 4, referred to *infra*, ch. 2), and "Pecuniary" damages increased, respectively, 21%, 25%, and 19% annually. See Keen, "Recent trends in court awards", Canadian Insurance/Agent & Broker (July, 1986) 24. Mr. Keen indicated to the Commission that the category of "General Damages" was intended to be a subset of "Non-Pecuniary" damages and to include, essentially, damages for pain and suffering. In a December 29, 1986 update sent to the Commission, Mr. Keen found that the "actual trend for all three regions combined...is 17.5%". In this update, "very large awards" were "capped" at $1 million, but a "trend of 15%" was assumed.

It would seem very doubtful, however, whether any firm conclusions can be based on these figures. The figures are based on reported cases, which are only a small fraction of the total number of claims paid. The sample is not necessarily representative, because cases establishing principles that lead to larger awards may tend to be selected by the judges as requiring written reasons, and by the editors of law reports as worthy of reporting.

[22] See, for example, Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at 51, and Waddams, *The Law of Damages* (1983), paras. 354 *et seq.*, at 201 *et seq.*

[23] *Supra*, note 19. See, especially, *Andrews*, *supra*, note 18, at 235.

[24] Although compensatory damages may also serve a deterrent function.

The four heads of damage may also be divided in another way, that is, as between special damages and general damages, the latter comprising the heads of damage in categories (2) to (4). Special damages refer to pre-trial losses and may involve all three of the categories of general damages. Finally, in yet another classification scheme, damages awarded to an injured person may be said to be divided into exemplary damages (awarded primarily[25] to deter and punish the defendant), and compensatory damages (awarded, as we have said, primarily to compensate the plaintiff for his losses, both pecuniary and non-pecuniary).

Not only may the wrongdoing give rise to an action for damages by the injured party or that party's estate, but it may also lead to separate claims made by and on behalf of certain dependants under Part V of the *Family Law Act, 1986*.[26] Such claims are advanced as a result of a loss to the dependant himself, rather than to the injured party. In Ontario, the spouse, child, grandchild, parent, grandparent, brother, and sister of the person injured or killed may recover in respect of a "pecuniary loss",[27] as well as "an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred".[28]

In chapter 2 of this Report, we shall consider, among other things, the present utility of these independent third party claims. The Commission's consideration of this and other related issues centres on the question whether dependants should continue to be entitled to claim compensation for certain losses arising from the injury or death of another person. Our review of the adequacy of existing law will take place in the context of a wider discussion of the distribution of awards of damages made in respect of what we shall call "loss of working capacity", that is, loss of earning capacity, loss of capacity to give care and guidance to certain named dependants, loss of capacity to provide household services, and loss of entitlement under a pension plan, annuity, or similar type of instrument. This broader discussion will include a consideration of the distribution of damage awards in both fatal and non-fatal accident cases.

Chapter 3 of the Report will examine damages for non-pecuniary loss, that is, pain and suffering, loss of amenities, and loss of expectation of life, particularly in light of the principles laid down by the Supreme Court of Canada in its 1978 trilogy of cases.[29] We shall consider the approach in the

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[25] However, sometimes exemplary damages are supported on the ground that they compensate the plaintiff for the pecuniary, or non-pecuniary, costs of litigation, or for other losses not recognized as compensable by the law of damages.

[26] *Supra*, note 4.

[27] *Ibid.*, s. 61(1).

[28] *Ibid.*, s. 61(2)(e).

[29] *Supra*, note 19.

trilogy; jury assessment of damage awards and the role of the trial judge and appellate court; survival of actions in favour of the injured person's estate; and damages for mental distress.

In chapter 4, the Commission will deal with one facet of general damages, namely, the cost of future care for injured persons. The Commission will consider, first, the level of care appropriate for the victim, and, secondly, the calculation of the award, with particular reference to the problems occasioned by the need to "gross-up" the award in order to offset liability for income tax on income derived from the investment of the award. In chapter 5, we shall discuss the form that an award of damages ought to take. In this context, we shall consider whether the court should be empowered to award damages in the form of periodic payments, in lieu of a lump sum award, regardless of whether all parties consent, and to review such an award at the instance of either party.

Chapter 6 of the Report contains a discussion of the "collateral benefits" that may be received by an injured party, that is, benefits (such as insurance proceeds, welfare, pensions, and private gifts) other than the damages paid by the wrongdoer. The Commission will consider whether collateral benefits should be taken into account when assessing such damages.

In chapter 7, the Commission will examine prejudgment interest. More specifically, we shall offer proposals concerning the date from which interest should begin to accumulate and the level of interest that should be paid. In chapter 8, the Commission will deal with three miscellaneous issues, namely, the impact of contingencies on awards, involving a prediction of what would have happened to the injured person had the injury not occurred and what the future needs of that person will be; the application of the discount rate to the damages award, necessitated by the plaintiff's immediate receipt of a lump sum payment respecting future pecuniary losses; and the award of a management fee to enable the injured party to obtain professional investment advice. In the last chapter, chapter 9, the Commission will discuss exemplary damages.

The Report also includes, as Appendices 1 and 2, respectively, two draft Bills, the *Personal Injuries Compensation Act* and the *Courts of Justice Amendment Act*, which are intended to give legislative form to the Commission's recommendations. Also set out, in Appendix 3, is a draft Rule that would implement the Commission's proposals concerning the standardization of assumptions underlying the calculation of gross-up. Appendix 4 contains a table that illustrates the amount of gross-up that would result, in a variety of factual situations, from the application of these assumptions. Appendix 5 reproduces the Ontario Report of the Special Committee of Bench and Bar, entitled the *Report of the Committee on Tort Compensation* (1980) (the "Holland Committee Report"). Finally, Appendix 6 lists the research papers prepared during the course of this Project.

CHAPTER 2

LOSS OF WORKING CAPACITY

1. GENERAL INTRODUCTION

When a person is injured or dies as a result of the wrongful act of another, that person, or her estate, suffers a loss of the income that would have been earned but for the wrongful act. An additional loss suffered is the loss of the victim's capacity to provide services, including guidance, care and companionship to others. These losses are related, as they have to do with the productive capacity of the victim, and we shall call them, together, working capacity.

The law provides compensation for loss of earning capacity (or loss of future earnings)[1] and for loss of services, including guidance, care and companionship, but assigns the right to claim in respect of these losses in some cases to the injured person or her estate, and in others to third parties. In this chapter we shall review generally the adequacy of existing law governing these kinds of loss, with particular reference to the question of who should be entitled to claim compensation for them. While this question arises in connection with other losses as well, it is particularly pressing in connection with working capacity. Because people so often work and provide not only for themselves, but also for others, third parties, as well as the injured individual or her estate, may experience a loss resulting from the injury or death of a tort victim. Nevertheless, it will be apparent from the ensuing discussion of the history and current state of the law that the existing scheme, whereby compensation may be claimed in some cases by the injured person or the estate of that person, and in others by third parties, has given rise to a number of difficulties, both substantive and procedural.

2. HISTORY AND CURRENT LAW

(a) Introduction

Historically, losses connected with fatal injuries have been treated quite differently from those associated with non-fatal injuries. While some of these differences have been eliminated in the course of the last decade, existing law continues to take a significantly different approach to compen-

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[1] For a discussion of the categorization of loss of future income as either loss of the capacity to earn income or loss of a future stream of earnings, see *infra*, this ch., sec. 5.

sation, depending on whether an injury is fatal or non-fatal. In the discussion that follows, we deal first with fatal injuries, and then with non-fatal injuries.

(b) Fatal Injuries

(i) Claims by the Estate for Loss of Earning Capacity

Actions at common law by the estates of deceased victims of torts were excluded by the *actio personalis moritur cum persona* rule, which prevented any recovery after the death of one of the parties to an action.[2] This rule has been amended by statute in all common law Canadian jurisdictions, so that in Canada most actions now survive death.[3] The governing provision in Ontario may be found in section 38(1) of the *Trustee Act*,[4] which provides as follows:

> 38.—(1) Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased; but if death results from such injuries no damages shall be allowed for the death or for the loss of the expectation of life, but this proviso is not in derogation of any rights conferred by Part V of the *Family Law Reform Act*.

On the face of it, it would seem to follow from the above provision that a claim for loss of earning capacity[5] would survive to the estate of a deceased victim and, in fact, in *Gammell v. Wilson*,[6] the House of Lords reached this conclusion on the basis of a similarly worded provision in the United Kingdom.[7] This result, however, fit uneasily with the statutory rights,

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[2] See references in Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at 385.

[3] *Ibid.*, *n.* 3.

[4] R.S.O. 1980, c. 512.

[5] Loss of earning capacity is discussed more generally below: see *infra*, this ch., sec. 5.

[6] *Gammell v. Wilson*, [1982] A.C. 27, [1981] 2 W.L.R. 248 (H.L.) (subsequent references are to [1982] A.C.).

[7] *Ibid.*, at 55. In England, prior to *Gammell v. Wilson*, as a result of the decision in *Oliver v. Ashman*, [1962] 2 Q.B. 210, [1961] 3 All E.R. 323 (C.A.), no damages were awarded to a tort victim for loss of earnings beyond her shortened life expectancy. *A fortiori*, if the plaintiff died immediately or before trial there could be no recovery at all for loss of future earnings. However, in *Pickett v. British Rail Engineering Ltd.*, [1980] A.C. 136, [1979] 1 All E.R. 774, the House of Lords overruled *Oliver*, and shortly after, in *Gammell v. Wilson*, held that recovery for loss of future earnings for the "lost years" should extend to an action brought on behalf of a deceased tort victim's estate.

discussed below,[8] of family members to claim in respect of their pecuniary losses consequent upon the death of a tort victim, and gave rise to the possibility of the defendant paying twice. The United Kingdom Parliament responded by providing that no claim for loss of future earnings survives to the estate of a tort victim.[9]

In Ontario, a similar result may have been achieved by virtue of the fact that, in practice, courts do not permit recovery for loss of future earnings by the estate of a deceased tort victim. In the words of Cooper-Stephenson and Saunders:[10]

> [D]amages for future loss seem in practice to be refused when in law they are arguably recoverable, on the ground that they are not statutorily prohibited.

(ii) Third Party Claims under the *Family Law Act, 1986*, Part V

a. General

According to an early nineteenth century decision, *Baker v. Bolton*,[11] "the death of a human being could not be complained of as an injury". Not until *Lord Campbell's Act*[12] in 1846, a version of which was enacted in Ontario in 1847 (hereinafter referred to as *The Fatal Accidents Act*),[13] was this rule changed. *The Fatal Accidents Act* provided that a wife, husband, parent (which included grandparent) and child (which included grandchild) of a person whose death resulted from a wrongful act should have a right of action for damages against the wrongdoer. This statutory group was enlarged in Ontario in 1978 by section 60 of *The Family Law Reform Act, 1978*,[14] now section 61 of the *Family Law Act, 1986*,[15] to include brothers and sisters. The current provision is as follows:

> 61.—(1) If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have

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[8] *Infra*, this ch., sec. 2(b)(ii)b.

[9] *Administration of Justice Act 1982*, c. 53 (U.K.), s. 4.

[10] *Supra*, note 2, at 391.

[11] *Baker v. Bolton* (1808), 1 Camp. 493, 170 E.R. 1033.

[12] *An Act for compensating the Families of Persons Killed by Accidents*, 9 & 10 Vict., c. 93, commonly known as *Lord Campbell's Act*.

[13] *An Act for compensating the Families of Persons Killed by Accident, and for other purposes therein mentioned*, 10 & 11 Vict., c. 6.

[14] *The Family Law Reform Act, 1978*, S.O. 1978, c. 2.

[15] *Family Law Act, 1986*, S.O. 1986, c. 4.

been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.

(2) The damages recoverable in a claim under subsection (1) may include,

(a) actual expenses reasonably incurred for the benefit of the person injured or killed;

(b) actual funeral expenses reasonably incurred;

(c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;

(d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and

(e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred.

(3) In an action under subsection (1), the right to damages is subject to any apportionment of damages due to contributory fault or neglect of the person who was injured or killed.

(4) No action shall be brought under subsection (1) after the expiration of two years from the time the cause of action arose.

A *Family Law Act, 1986* right is independent of the right in tort of the injured person although, by the terms of section 61(1), it is conditional on the existence of the latter. It arises out of the fact that an injury to another causes the claimant to suffer a pecuniary loss. It is not necessary that the claimant have been dependent on the injured person, merely that she is likely to have been deprived of some pecuniary advantage by the injury.[16] The basic principle that then governs assessment of damages to a *Family Law Act, 1986* claimant is the same as that which operates in tort law generally, that is, the claimant is to be put in the position that she would have occupied had the injury not occurred.[17]

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[16] *Proctor v. Dyck*, [1953] 1 S.C.R. 244, [1953] 2 D.L.R. 257. However, this seems to have been limited to those pecuniary advantages that arise solely out of the familial relationship to the exclusion of those arising out of a business relationship between family members. See, also, *Burgess v. Florence Nightingale Hospital for Gentlewomen*, [1955] 1 Q.B. 349, [1955] 1 All E.R. 511, and *Saikaley v. Pelletier*, [1966] 2 O.R. 476, 57 D.L.R. (2d) 394 (H.C.J.).

[17] *Keizer v. Hanna*, [1978] 2 S.C.R. 342, at 352, 82 D.L.R. (3d) 449.

We shall deal in chapter 4 with claims under clauses (a) to (d) of section 61(2).[18] For present purposes, it is third party claims in respect of the deceased's lost earning capacity—that is, claims for loss of monetary contributions—and claims for loss of services, including guidance, care and companionship under section 61(2)(e), that are of concern.

b. Loss of Monetary Contributions

In assessing a claim for loss of monetary contributions, the court is required to consider the extent to which the injured person would have provided for the claimant. This generally means that the court must first evaluate the earning capacity of the deceased tort victim, considering the various contingencies and discount factors, as would be done in the case of a claim by the tort victim herself for loss of earning capacity.[19]

Claims under the *Family Law Act, 1986* (which may also be called "relational loss claims") also involve additional speculations.[20] The court must estimate the length of time during which the claimant could have been expected to be supported. To the extent that this depends on the life expectancy of the claimant, this must be assessed in the same way as is the victim's life expectancy. Since both are relevant here, the joint life expectancy must be calculated. In the case of dependent children, it is the combination of the life expectancy of the tort victim and the period during which the child would have remained dependent that is relevant. In the case of a spouse, the period during which support would have continued also depends on how long the marriage (or common law relationship) would likely have lasted.[21]

As well as the contingencies regarding what might have happened if the injury had not occurred, the court must take into account contingencies surrounding what might happen to the claimant in the future to reduce the loss caused by the death of the tort victim. For a spouse this typically involves the chance of pecuniary advantage from a possible or actual remarriage. Although the English courts have found this speculation so distasteful[22] that it has been removed by statute (at least with respect to

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[18] *Infra*, ch. 4, sec. 5.

[19] For a discussion of how courts calculate damages for loss of earning capacity, see *infra*, this ch., sec. 5.

[20] For discussion, see Waddams, *The Law of Damages* (1983), paras. 690-94, at 393-95.

[21] *Julian v. Northern and Central Gas Corp. Ltd.* (1979), 31 O.R. (2d) 388, at 399-400, 118 D.L.R. (3d) 458 (C.A.) (subsequent references are to 31 O.R. (2d)), leave to appeal to the Supreme Court of Canada denied (1980), 31 O.R. (2d) 388*n*., and *Kwong v. The Queen in right of Alberta* (1978), 14 A.R. 120, [1979] 2 W.W.R. 1 (S.C., App. Div.), aff'd [1979] 2 S.C.R. 1010.

[22] *Buckley v. John Allen & Ford (Oxford) Ltd.*, [1967] 2 Q.B. 637, [1967] 1 All E.R. 539.

widows),[23] there is no such statutory provision in Ontario, so that courts must continue to address the issue.[24]

c. Loss of Guidance, Care and Companionship

Although *Lord Campbell's Act*,[25] and *The Fatal Accidents Act*[26] based on it, state simply that a wrongdoer is liable "to an action for damages", it was early held that only pecuniary loss was recoverable under this statutory cause of action: there was to be no compensation for grief or mental distress as solace for the loss.[27] The courts' understanding of pecuniary loss, however, turned out to be rather expansive. In 1885, in *The St. Lawrence & Ottawa Railway Co. v. Lett*, Chief Justice Ritchie, on behalf of the majority of the Supreme Court of Canada, stated as follows:[28]

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[23] *Fatal Accidents Act 1976*, c. 30 (U.K.), s. 3(2), continued by the *Administration of Justice Act 1982, supra*, note 9, s. 3(3). It should be noted that this provision appears to have been repealed by the *International Transport Conventions Act 1983*, c. 14 (U.K.), Sch. 3. However, it seems reasonable to conclude that the repeal is for the limited purposes of the latter Act only.

At least one Canadian jurisdiction has followed the English lead: see *Fatal Accidents Act*, S.P.E.I. 1978, c. 7, s. 7(1)(a), to the effect that "the probability that a dependant may marry or the effect of such probability on any other dependant" shall not be taken into account in assessing damages in a proceeding brought under the Act.

[24] See, for example, *Ball v. Kraft* (1966), 60 D.L.R. (2d) 35 (B.C.S.C.); *Dormuth v. Untereiner*, [1964] S.C.R. 122, (1963), 43 D.L.R. (2d) 135; *Fleming v. Markovich*, [1942] O.W.N. 525, [1942] 4 D.L.R. 287 (C.A.); and *Lefebvre v. Dowdall*, [1965] 1 O.R. 1, 46 D.L.R. (2d) 426 (H.C.J.).

See, also, the following cases from other jurisdictions dealing with possible pecuniary benefit from remarriage: *Sorensen v. Beach*, [1971] 5 W.W.R. 488 (B.C.S.C.); *Tucker v. Lindstrom*, [1972] 6 W.W.R. 757, [1972] I.L.R. 1-500 (B.C.S.C.); *Alaffe v. Kennedy* (1973), 11 N.S.R. (2d) 457, 40 D.L.R. (3d) 429 (N.S.S.C., T.D.); *MacDonell v. Maple Leaf Mills Ltd.* (1972), 26 D.L.R. (3d) 106, [1972] 3 W.W.R. 296 (Alta. C.A.); *Allain v. Dunn* (1960), 23 D.L.R. (2d) 770, 45 M.P.R. 89 (N.B.C.A.); and *Lamont v. Pederson* (1979), 6 Sask. R. 361, [1979] 6 W.W.R. 577 (Q.B.), aff'd (1981), 7 Sask. R. 18, [1981] 2 W.W.R. 24 (C.A.).

It has also been held that, in the case of a child claimant, the possibility of pecuniary advantage from legal or *de facto* adoption is relevant to assessment of damages: see, for example, *Lefebvre v. Dowdall*, *supra*, this note, and *Fawns v. Green*, [1972] 1 W.W.R. 272 (B.C.S.C.). However, a very recent decision of the Ontario Court of Appeal is to the effect that the economic benefits of adoption, being the result of private benevolence, should not be taken into account to reduce the damages payable by a tortfeasor: *Sheppard v. McAllister* (1987), 60 O.R. (2d) 309, 22 O.A.C. 57.

[25] *Supra*, note 12.

[26] *Supra*, note 13.

[27] *Blake v. Midland Railway Co.* (1852), 18 Q.B. 93, 118 E.R. 35; *Franklin v. South Eastern Railway Co.* (1858), 3 H. & N. 211, 157 E.R. 448 (Ex.); and *Pym v. Great Northern Railway Co.* (1862), 2 B. & S. 760, 121 E.R. 1254 (C.A.).

[28] *The St. Lawrence & Ottawa Railway Co. v. Lett* (1885), 11 S.C.R. 422, at 432-33.

> I cannot think that in giving compensation to a child for the loss of its parent the legislature intended so to limit the remedy as to deprive the child of compensation for the greatest injury it is possible to conceive a child can sustain, namely, in being deprived of the care, education and training of a mother, unless it could be shown that the loss was a pecuniary loss of so many dollars or so much property, a construction which, in ninety-nine cases out of a hundred, would simply amount to saying that though there was an almost irreparable injury, affecting the present and future interests of the child, no compensation was to be awarded; in other words it would be, in effect, to deny to a child compensation for the death of a mother by negligence in almost every conceivable case.

The majority awarded damages on the basis that "such education is a benefit and advantage to the child and is capable of being estimated in money".[29] No award was made, however, "to soothe the feelings of the husband or child".[30] Thus a new head of damage seemed to appear, not exactly pecuniary because it could not be said that the child had suffered a "loss of so many dollars or so much property", but constituting the deprivation of an advantage—a special form of "service"—for which an award of damages was justified other than on the basis of solace.

Until very recently, courts in Canada have continued to treat the loss of a parent's care, training and guidance as pecuniary in nature. Thus, in 1967, in *Vana v. Tosta*, the Supreme Court of Canada, awarding damages for loss of "care and moral training", stated that there must be "evidence which makes it reasonably probable that the children will actually suffer a pecuniary loss as a result of their mother's death".[31] Similarly, loss of the "guidance, training and encouragement" of a father was considered pecuniary by the Ontario Court of Appeal.[32]

As discussed above, *The Fatal Accidents Act* was repealed in Ontario in 1978, and its provisions became part of *The Family Law Reform Act, 1978*,[33] which in turn was replaced in 1986 by the *Family Law Act, 1986*. The Legislature in 1978 seemed to adopt explicitly the limitation to pecuniary loss that had been imposed by the courts for over a century: section 60(1) entitled the statutory claimants to "recover their pecuniary loss resulting from the injury or death". However, section 60(2), in listing the types of damage that were recoverable under section 60(1), included the following:

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[29] *Ibid.*, at 436.

[30] *Ibid.*, at 433.

[31] *Vana v. Tosta*, [1968] S.C.R. 71, at 92, 66 D.L.R. (2d) 97, *per* Ritchie J. Although Ritchie J. dissented in part, there was no disagreement on this point.

[32] *Julian v. Northern and Central Gas Corp. Ltd.*, *supra*, note 21, at 391.

[33] Part V of the 1978 legislation implemented recommendations contained in the Ontario Law Reform Commission's *Report on Family Law, Part I: Torts* (1969). See discussion *infra*, this ch., sec. 3.

(d) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred.

Notwithstanding the obvious argument that guidance, care and companionship were to be seen as pecuniary losses, the Ontario Court of Appeal concluded, in *Mason v. Peters*,[34] that the intention was actually to permit damages for a loss that is "essentially non-pecuniary in character". At the same time, however, the Court stressed that grief, sorrow and mental anguish had not been made compensable.

The Court of Appeal in *Mason v. Peters* described the loss suffered by someone deprived of guidance, care and companionship as being "not generally capable of computation on a strictly monetary basis".[35] This point had been made by the Supreme Court of Canada in the *St. Lawrence* case but had not been considered an impediment to classifying the loss as pecuniary. The purpose of the compensation under this head is not made precisely clear in *Mason v. Peters*. "Pecuniary loss concepts", the Court said, "produced awards wholly incommensurate with the true loss sustained"[36] by the death of a close relation, in the particular case, a child. But the head of damage, if non-pecuniary, seems difficult to distinguish from other heads that are intended to serve as solace, including grief, sorrow, and mental anguish.

Ontario decisions have diverged on the question of whether restraint or indulgence is the appropriate attitude to compensation for loss of guidance, care and companionship. In *Reidy v. McLeod*,[37] Mr. Justice Bowlby of the High Court, in somewhat emotional terms, made what could be described as liberal awards to family members. The Court of Appeal, on appeal, indicated that the assessment was to be made "in as objective and unemotional a manner as possible in these sad cases",[38] and reduced the awards by half.

In *Nielsen v. Kaufmann*,[39] the Ontario Court of Appeal held that it was an error to base an award of damages under section 60(2)(d) of the *Family Law Reform Act*[40] (now section 61(2)(e) of the *Family Law Act, 1986*) on the

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[34] *Mason v. Peters* (1982), 39 O.R. (2d) 27, at 38, 139 D.L.R. (3d) 104 (C.A.) (subsequent references are to 39 O.R. (2d)), leave to appeal to the Supreme Court of Canada denied [1982] 2 S.C.R. x, 46 N.R. 538*n*.

[35] *Ibid.*, at 38.

[36] *Ibid.*

[37] *Reidy v. McLeod* (1984), 47 O.R. (2d) 313, 11 D.L.R. (4th) 411 (H.C.J.).

[38] *Reidy v. McLeod* (1986), 54 O.R. (2d) 661, at 662, 27 D.L.R. (4th) 317 (C.A.).

[39] *Nielsen v. Kaufmann* (1986), 54 O.R. (2d) 188, 26 D.L.R. (4th) 21 (C.A.) (subsequent references are to 54 O.R. (2d)).

[40] R.S.O. 1980, c. 152.

principle of *restitutio in integrum* that is followed in calculating compensation for the pecuniary loss of an injured person. While identifying the *Family Law Reform Act* as a remedial statute that must be liberally construed, the Court of Appeal refused to extend it "to include ideal and optimum schooling for a child who has already been generously compensated by an award of general damages for the loss of his mother's guidance, care and companionship".[41] In the opinion of the Court, this would have been an undue and unwarranted extension of the principle that money could be used to improve the future mental health of an injured person. The damages for loss of guidance, care and companionship payable to the son were reduced on appeal from $90,856 to $30,000.

Speaking generally about the basis for assessing non-pecuniary awards under the *Family Law Reform Act*, the Court said:[42]

> In time there may be awards for the loss of care, guidance and companionship in the 'average' family which will come to be recognized as 'conventional'. It is difficult now to see how such a family can be discovered or described.
>
> It is self-evident, as has been said, that the amount of compensation in any given case 'will depend on the facts and circumstances in evidence in the case': *Mason v. Peters*.... Although essentially non-pecuniary in character, there must be an actual loss of care, companionship and guidance. A brother of a deceased, for example, who lives in Vancouver and who has not seen the deceased, who lives in Toronto, for 20 years, although they exchange Christmas cards and a telephone call a year, would not, in our view, be entitled to any compensation. Undoubtedly, there would be grief and sorrow and a sense of loss but, under the circumstances recited, there would be no loss compensable under the section.

The reference to "conventional" awards seems to imply that some degree of restraint and consistency is desirable. At the same time, it is clear that some element of subjectivity must enter into compensation decisions. In other words, the deprivation actually experienced by the particular claimant remains the basis for the calculation.[43]

d. Loss of Services

The law has long provided compensation to third parties for loss of services that would have been provided by the deceased.[44] For example, a spouse or parent may claim "the cost of hiring reasonable services on a

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[41] *Nielsen v. Kaufmann*, *supra*, note 39, at 195.

[42] *Ibid.*, at 199-200.

[43] See, also, *Zdasiuk v. Lucas* (1987), 58 O.R. (2d) 443 (C.A.), which is to the same effect.

[44] See Waddams, *supra*, note 20, para. 710, at 405, and authorities cited therein. See, also, Cooper-Stephenson and Saunders, *supra*, note 2, at 430-40.

commercial basis to replace lost domestic services" performed by a spouse or child.[45]

In *Nielsen v. Kaufmann*[46] the Ontario Court of Appeal, referring to an award at trial for loss of future and past housekeeping services, stated as follows with respect to the propriety of such awards under Part V of the *Family Law Reform Act*:

> A money value was placed on this loss of 'care' on the basis of the market price of housekeeping services. The loss under s. 60(2)(d) [now section 61(2)(e) of the *Family Law Act, 1986*] is not a pecuniary loss in the strict sense of the word: *Mason v. Peters et al.* (1982), 39 O.R. (2d) 27, 139 D.L.R. (3d) 104, 22 C.C.L.T. 21. However, we recognize the pecuniary component relating to damages for loss of housekeeping services under s. 60(1) [now section 61(1)] of the *Family Law Reform Act*.

The Court accordingly added the sum of $60,000 for lost housekeeping services to the amount awarded to the plaintiff for loss of care pursuant to what is now section 61(2)(e) of the *Family Law Act, 1986*.

(c) Non-Fatal Injuries

(i) Claims by the Injured Person for Loss of Earning Capacity

In the case of personal injury not resulting in death, the injured person has a claim in respect of loss of future earnings, or lost earning capacity. We shall deal at a later stage in this chapter[47] with the law relating to the categorization of this loss.

(ii) Third Party Claims under the *Family Law Act, 1986*, Part V, for Loss of Monetary Contributions, Services, and Guidance, Care and Companionship

Lord Campbell's Act,[48] and *The Fatal Accidents Act*[49] based on it, were enacted to remove the common law bar to recovery by a third party of losses consequent on the death of another.[50] The Acts applied only in the case of fatal injuries. In the case of non-fatal injuries, the common law governed, leaving third parties with limited scope to claim in respect of their losses.

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[45] Waddams, *supra*, note 20, para. 710, at 405, quoted with approval by the Ontario Court of Appeal in *Nielsen v. Kaufmann*, *supra*, note 39, at 196.

[46] *Ibid.*

[47] *Infra*, this ch., sec. 5.

[48] *Supra*, note 12.

[49] *Supra*, note 13.

[50] See discussion *supra*, this ch., sec. 2(b)(ii)a.

There was authority that certain direct third party expenses, as well as an allowance for the cost of services provided by a third party to an injured person, were recoverable by the injured person in her own right,[51] and some cases held that such damages should be held on trust for the third party.[52] These sorts of losses are now dealt with by sections 61(2)(a), (c) and (d) of the *Family Law Act, 1986*,[53] and are discussed in chapter 4 of this Report.[54] However, the common law did not permit recovery by third parties for loss of monetary contributions. Loss of services and of guidance, care and companionship were compensable, if at all, only through the *actio per quod servitium amisit* and the *actio per quod consortium amisit*. The first, an action to recover the value of services that would have been provided by an injured person, is discussed later in relation to claims by employers.[55] Together, the *servitium* and *consortium* actions allowed recovery by a husband in respect of the loss of a wife's services and companionship.[56] The *servitium* action was also available to a parent in respect of loss of a child's services.[57] The parent's and husband's actions were expressly abolished in Ontario by *The Family Law Reform Act, 1978*.[58]

In 1978, with the enactment of *The Family Law Reform Act, 1978*, the provisions of *Lord Campbell's Act* were extended to apply to cases of non-fatal injury.[59] Accordingly, third parties in Ontario may advance the same claims in the context of non-fatal injuries, in respect of loss of monetary contributions, services, and guidance, care and companionship, as in the context of fatal injuries. The current provision is section 61 of the *Family Law Act, 1986*, set out above,[60] and the discussion above applies equally to cases of non-fatal injury.

It should be noted that the possibility of a third party claim in respect of loss of monetary contributions rests somewhat uneasily with the recovery permitted to the injured person herself. Since there is no indication that the Act was intended to limit the rights of the injured party, the possibility of overlap in awards arises. It has been suggested[61] that, the Legislature's

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[51] See Cooper-Stephenson and Saunders, *supra*, note 2, at 139-46, and Waddams, *supra*, note 20, paras. 368-73, at 210-14, and para. 664, at 376-77.

[52] *Ibid.*, para. 370, at 212-13.

[53] *Supra*, note 15.

[54] *Infra*, ch. 4, sec. 5.

[55] *Infra*, this ch., sec. 9.

[56] See Cooper-Stephenson and Saunders, *supra*, note 2, at 484-85.

[57] See, generally, Waddams, *supra*, note 20, paras. 293-308, at 169-78.

[58] *The Family Law Reform Act, 1978*, *supra*, note 14, s. 69. See, now, *Dower and Miscellaneous Abolition Act*, R.S.O. 1980, c. 152, s. 69, as am. by S.O. 1986, c. 4, s. 71.

[59] *The Family Law Reform Act, 1978*, *supra*, note 14, s. 60.

[60] *Supra*, this ch., sec. 2(b)(ii)a.

[61] Waddams, *supra*, note 20, para. 436, at 256.

intention in permitting recovery for loss of monetary contributions "apparently being to provide a modern equivalent of the actions for loss of consortium and servitium abolished by...the Act", it is possible to interpret section 61 as restricting the rights of *Family Law Act, 1986* claimants to the recovery of "such loss as is not recoverable by the injured person himself".[62]

3. PROBLEMS WITH THE EXISTING LAW

As the foregoing discussion indicates, the current law treats loss of earning capacity and loss of services, including loss of guidance, care and companionship, as separate heads of damage. The first is considered a loss to the injured person, or (in theory, but not in practice) to her estate. The second is considered a loss to third parties and is compensated, in the case of both injury and death, under Part V of the *Family Law Act, 1986*. Associated with, but quite distinct from, the injured person's claim for loss of earning capacity is the right of third parties under section 61(1) of the *Family Law Act, 1986* to claim monetary contributions—that is, that portion of the future earnings of the tort victim that would have benefited them.

The history of the law in this area has been one of an uneasy combination of two theories of compensation—one, that the loss is that of the injured person and, therefore, in case of death, her estate; the other, that third parties should have independent rights in their own names. In 1846, *Lord Campbell's Act*[63] (a version of which was enacted in Ontario in 1847[64]) selected, as the primary theory, that of independent rights in third parties, although the legislation contains features that can only be explained on a derivative theory.[65] The latter theory was reaffirmed in 1978 (when the Ontario *Fatal Accidents Act* was repealed and its provisions moved to *The Family Law Reform Act, 1978*[66]) and was extended in several important respects.

The combination of two theories of compensation, and the expansion in 1978 of the rights of third parties to recover in respect of monetary contributions and guidance, care and companionship in cases of both fatal and non-fatal injury, have created a number of problems in the law.

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[62] *Ibid.*

[63] *Supra*, note 12.

[64] *Supra*, note 13.

[65] See Waddams, *supra*, note 20, para. 787, at 448:

> [T]he action depended on the deceased's having been entitled himself to sue, and if the deceased settled or secured a judgment in his lifetime, the claimant's action was defeated, as also if the deceased lost an action or allowed it to become time barred. The action had to be a single action only, brought in the name of the deceased's personal representative, and was liable to reduction for the deceased's contributory negligence.

[66] *Supra*, note 14.

First, there is uncertainty in the existing law about how to coordinate third party rights of recovery with the rights of the injured party or his estate. Thus, there is a potential overlap between claims by an injured person, or his estate, for loss of earning capacity and claims by third parties for their pecuniary loss under Part V of the *Family Law Act, 1986*. While the courts may have resolved this problem in the context of fatal injuries by refusing in practice to allow survival actions for loss of future earnings,[67] the issue does not appear to have been definitively resolved in the case law; nor does a straightforward reading of section 38(1) of the *Trustee Act* suggest the practical result.[68] Accordingly, it remains conceivable that an Ontario court will permit survival of an action for lost earning capacity, as did the House of Lords in *Gammell v. Wilson*,[69] with the resulting possibility of the defendant being forced to pay twice in respect of a deceased's earning capacity.[70]

As discussed above,[71] the potential for duplicative claims is present also in the context of non-fatal injuries, since, under section 61 of the *Family Law Act, 1986*, third parties have a right to claim for pecuniary loss in the case of non-fatal injury.

A second difficulty arises out of the relational nature of an action for damages for loss of monetary contributions under the *Family Law Act, 1986*. Since the cause of action depends upon proof of loss of expectation of pecuniary benefit, the court is obliged to engage in somewhat distasteful speculation concerning such matters as, in the case of a spousal claim, how long the marriage would have lasted. Prospects of pecuniary advantage from the possible remarriage of a widow or widower are also relevant in assessing the loss occasioned by the death.[72]

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[67] See Cooper-Stephenson and Saunders, *supra*, note 2, at 391. This issue is discussed *supra*, this ch., sec. 2(b)(i).

[68] *Ibid*.

[69] *Supra*, note 6, rev'd in England by the *Administration of Justice Act 1982*, *supra*, note 9, s. 4.

[70] Waddams, *supra*, note 20, para. 765, at 439, has summarized the consequences of the holding in *Gammell v. Wilson*, *supra*, note 6, as follows:

> First, where the same persons are the beneficiaries of the estate and entitled to claim under Lord Campbell's Act (as is usual), recovery under the Act was effectively superseded, for the estate's recovery of the lost earning capacity will always equal or exceed the value of the lost dependency. A second consequence is that a tortfeasor who causes the death of an unmarried wage-earner has to pay much larger damages than formerly thought to be exigible, for the value of the lost earning capacity will be recoverable by the estate. Thirdly, if it should happen that the estate beneficiaries and the Lord Campbell's Act claimants are different persons, there is a real prospect of the defendant being made to pay twice over for the loss of the deceased's earning capacity.

[71] *Supra*, this ch., sec. 2(c)(ii).

[72] See *supra*, note 24.

Further difficulties may be seen as flowing from the enactment of Part V of the *Family Law Reform Act, 1978* and its subsequent interpretation by the courts. As has been discussed,[73] previous fatal accidents legislation had restricted damages to proven pecuniary loss and had denied compensation for grief, sorrow and mental anguish. While this position had been modified somewhat by cases that allowed claims for loss of a parent's care, training, guidance, and encouragement,[74] the theory behind these cases was that these losses were pecuniary in nature.

In 1969, this Commission, in Part I of its *Report on Family Law*,[75] addressed briefly the question of non-pecuniary losses. The Commission considered that a full study of the question should be undertaken, and added:[76]

> When a study is undertaken, the very difficult question of non-pecuniary loss should be examined. While the Commission has great sympathy for the wife whose husband is totally comatose as a result of a brain injury, what dollar and cents value can be placed on the loss of his affection and companionship? If an assessment of that value were to be made by the courts, would not this turn each case into an investigation of just how satisfying or unsatisfying the marital relationship had been?

Accordingly, the Commission recommended (one Commissioner dissenting) that, in the contemplated legislation, "the damages recoverable be confined to pecuniary loss, as is the case under *The Fatal Accidents Act*".[77]

When the provisions of the Ontario fatal accidents legislation were repealed and transferred to the *Family Law Reform Act, 1978*, a claim for guidance, care and companionship was "included", by section 60(2)(d), in the pecuniary loss resulting from injury or death recoverable by third parties under section 60(1). As we have indicated, the courts have now held that the intention of the Legislature was to make a marked change in the law, and to extend recovery to non-pecuniary losses.[78]

In theory, it remains the law that grief, sorrow and mental anguish are not compensable, but the cases show that it is difficult, if not impossible, in practice to distinguish damages for loss of guidance, care and companion-

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[73] *Supra*, this ch., sec. 2(b)(ii)c.

[74] *The St. Lawrence & Ottawa Railway Co. v. Lett*, *supra*, note 28; *Vana v. Tosta*, *supra*, note 31; and *Julian v. Northern and Central Gas Corp. Ltd.*, *supra*, note 21.

[75] *Supra*, note 33.

[76] *Ibid.*, at 109.

[77] *Ibid.*, at 110 (emphasis deleted).

[78] *Mason v. Peters*, *supra*, note 34, and *Nielsen v. Kaufmann*, *supra*, note 39.

ship from damages for grief.[79] In *Mason v. Peters*,[80] for example, the Ontario Court of Appeal stated that the deprivation of companionship caused by the wrongful death,

> ...constitutes an irreplaceable loss for which [the plaintiff] is entitled to recovery. It is true that money cannot cure the loss, but it remains the only means available to society to recompense the wrongful destruction of the family relationship.

Moreover, the subsequent decisions of *Nielsen v. Kaufmann*[81] and *Zdasiuk v. Lucas*[82] indicate that an inquiry is needed into the value of the lost relationship in each case. In *Zdasiuk*, the Court of Appeal held that the warmth of the affection and companionship that existed between the claimant and the deceased, and the extent to which the one had played a special role in the life of the other, had to be investigated with reference to the facts of the particular case. This is the very possibility that this Commission foresaw in 1968.[83]

There is no doubt that the loss of a special, close or warm relationship[84] is a real loss. Against the benefit of compensating this loss, however, must be weighed the costs of achieving compensation. Reference has been made above to the distasteful nature of the inquiry required to establish a claim to guidance, care and companionship. Moreover, as O'Connell and Kelly have pointed out, life insurance does not take into account the survivor's grief:[85]

> [T]he face amount of the policy is paid—no more, no less, regardless of love, hate, or indifference.

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[79] The Manitoba Court of Appeal has called an award under similar legislation a "solatium": *Larney Estate v. Friesen* (1986), 41 Man. R. (2d) 169, 29 D.L.R. (4th) 444 (subsequent reference is to 29 D.L.R. (4th)).

[80] *Supra*, note 34, at 40.

[81] *Supra*, note 39.

[82] *Supra*, note 43.

[83] See *supra*, the text accompanying notes 75-77. In *Larney Estate v. Friesen*, *supra*, note 79, O'Sullivan J.A. said, at 449, for the majority of the Manitoba Court of Appeal:

> The problem with assessing an amount to be paid for loss of companionship is that, unless conventional figures are worked out, trials are likely to become filled with evidence of the worth or lack of worth of the deceased's life, of the nature of the relationship and the quality of the companionship given in life. This inquiry is likely to be futile. It would subject the grief of relatives of the deceased to the court process of examination and cross-examination to see whether one amount or another should be awarded for loss of companionship. This would be a hardship on all of the parties.

[84] The compensable loss in *Zdasiuk v. Lucas*, *supra*, note 43, was described in these terms by the Ontario Court of Appeal.

[85] O'Connell and Kelly, *The Blame Game* (1987), at 125.

The present legislation, however, compels everyone, in effect, to purchase insurance in respect of grief indirectly, through liability insurance premiums, taxes, and the costs of goods and services. The expense of permitting awards that are, in essence, by way of solace, is thus borne by all.

There have been other, far-reaching, consequences of the *Family Law Reform Act, 1978*. The Act extended the class of relatives entitled to claim compensation to include brothers and sisters, and permitted recovery in the case of non-fatal injuries as well as death. These changes have given rise to a multiplicity of claims,[86] many of a minor or trivial nature, with the result that proceedings may be complicated and settlements delayed. Indeed, settlements with each of the eligible relatives may, when taken together, prove quite costly.[87]

The amounts awarded are not always small. Moreover, the Court of Appeal, in *Nielsen v. Kaufmann*, has held that there can be no conventional figure, but that the amount to be awarded will depend on the evidence in each case. The lack of a conventional award and the need to adduce evidence in each case in respect of a large number of claimants can lead to problems of inconsistency and high transaction costs. In a recent case where a husband and wife were injured in an automobile accident, each suffering fractures and spending a few days in hospital, a jury awarded $52,000 to the husband, and $39,000 to the wife under the *Family Law Reform Act*. There was some evidence of a personality change on the part of the wife, and of impotence on the part of the husband, but the Court of Appeal found this evidence to be unsatisfactory. Although the awards were set aside as unreasonable and a new trial ordered, the case established no guidelines for such awards, and it illustrates the very high costs associated with attempting to compensate such losses.[88]

Additional problems stem from procedural aspects of the *Family Law Act, 1986*. *The Family Law Reform Act, 1978*, like *The Fatal Accidents Act* before it, contained a provision prohibiting more than one action to recover third party losses in respect of the same occurrence.[89] A plaintiff advancing a third party claim was required by the Act to join in her statement of claim any other person "entitled to maintain an action" in respect of the same

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[86] One insurer has stated that in some cases the number of claimants exceeded fifty: see Allstate Insurance Company of Canada, *Submission to the Ontario Task Force on Insurance on Family Law Reform Act* (February, 1986), at 1. Such a case must be exceptional, but claims of twenty relatives, especially where there have been several marriages, are not hard to envisage.

[87] See Canadian Bar Association—Ontario, Committee to Review Problems in the Casualty Insurance Industry, *Submission to the Ontario Task Force on Insurance* (April, 1986), at 4.

[88] *Vieczorek v. Piersma* (1987), 58 O.R. (2d) 583, 36 D.L.R. (4th) 136 (C.A.).

[89] *The Family Law Reform Act, 1978*, *supra*, note 14, s. 60(4).

injury or death.[90] Moreover, the plaintiff had to file an affidavit asserting that the persons named in the statement of claim were "the only persons who are entitled or claim to be entitled to damages under section 60".[91]

The procedural provisions were inserted in order to avoid a multiplicity of actions by family members in respect of the same injury or death. However, the provisions gave rise to serious problems in practice.[92] As a result, the Legislature, when it enacted the *Family Law Act, 1986*, dropped the requirement that there be only one action by third parties. Under the 1986 Act, each statutory claimant may commence her own action.[93] This state of affairs, however, has given rise to new problems, of open-ended liability and unrealistic results.

Turning first to the problem of open-ended liability, under existing law defendants and their insurers do not know, when defending one suit, what claims may be advanced later. As a result, negotiations and settlements become difficult, and the legal and other costs of proceedings are increased because of the need to investigate and evaluate potential claims.

With respect to unrealistic results, each person's capacity to provide, financially and otherwise, is finite. Particularly with respect to loss of guidance, care and companionship, however, multiple suits may result in a number of awards, which, taken together, exaggerate the capacity of the injured or deceased person.

4. WHO SHOULD BE ABLE TO CLAIM FOR LOSS OF WORKING CAPACITY?

(a) A Proposal for Reform

The preceding discussion has focused on the present law, and its deficiencies, with respect to first and third party claims arising out of an injured or deceased person's loss of the capacity to earn future income or to provide services, including guidance, care and companionship. We have stated our view that the two capacities are closely related and we refer to them, together, as working capacity.

The Commission has concluded that many of the problems of the existing law identified above stem from the fact that the loss of working

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[90] *Ibid.*, s. 62(1).

[91] *Ibid.*, s. 62(2). Section 60 (now s. 61 of the *Family Law Act, 1986*) set out the rights of third parties to recover in respect of the injury or death of another.

[92] The problems are described in Spiegel, "The New Family Law Act", Lecture given for the Law Society of Upper Canada, Continuing Education Program, May 24, 1986, at F-16 to F-17. See, also, Waddams, *supra*, note 20, para. 782, at 445.

[93] *Family Law Act, 1986*, *supra*, note 15, s. 61(1).

capacity is not assigned clearly, and exclusively, to the injured person or her estate. We believe that a fundamental change in the law to this effect, involving abolition of all third party claims in respect of working capacity, would greatly simplify and rationalize the law, and would decrease costs, while preserving fair compensation.

In our opinion, the loss of capacity to work should be viewed primarily as a loss to the victim. To be deprived of this capacity involves loss not only of its fruits, but also of the choice as to how to use it. The loss to family members, on the other hand, is derivative and contingent. They suffer a loss only to the extent that the victim would have chosen to spend the proceeds of her labour or her energies on their behalf.

This view, we would note, is consistent with the existing position that an injured person with reduced opportunities to pursue the amenities of life should nevertheless recover the full value of her lost earning capacity.[94] It is, moreover, reflected in part by the *Family Law Act, 1986,* which, notwithstanding its according of independent rights to third parties, contains features that can only be explained on a derivative theory: under the Act, third party claims are maintainable only "under circumstances where the [injured] person is entitled to recover damages, or would have been entitled if not killed".[95]

In proposing that all recovery for loss consequent upon an injury be channelled through the injured person or her estate, we do not suggest that the interests of family members are unimportant. To ensure that family members are provided for is clearly a worthwhile social policy, and the decision to do so by creating independent rights of action for them is understandable, especially given the history of their creation. At the time when the first fatal accidents legislation was passed, actions at common law by the estates of tort victims were precluded by the *actio personalis moritur cum persona* rule, preventing any recovery after the death of a party to an action.[96] The existence of this rule, together with the rule in *Baker v. Bolton*[97] prohibiting a suit by a third party for the death of another, meant that the only way to secure the interests of persons dependent on tort victims was through legislation providing dependants with their own actions.

However, with the principle of survival of actions enshrined in the *Trustee Act*[98] and antecedent legislation since 1886,[99] we are free to make a

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[94] *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452 (subsequent references are to [1978] 2 S.C.R.).

[95] *Family Law Act, 1986*, *supra*, note 15, s. 61(1). See, also, *supra*, note 65.

[96] See *supra*, this ch., sec. 2(b)(i).

[97] *Supra*, note 11.

[98] *Supra*, note 4, s. 38(1), reproduced *supra*, text accompanying note 4.

[99] See *The Statute Amendment Act, 1886*, 49 Vict., c. 16, s. 23, which repealed and substituted new ss. 8 and 9 of *An Act Respecting Trustees and Executors and the Administration of Estates*, R.S.O. 1877, c. 107.

principled decision about how to compensate for losses consequent on personal injury. Once it is accepted that a personal action does not die with the person, it seems to follow that the rights of an estate of an injured person, who then dies, ought to be the same as those that the injured person herself could have asserted, had she lived. It is anomalous for the recovery to vary dramatically according to whether the injured person dies just before, or just after, judgment.

The primary benefit of channelling all recovery through the injured person or her estate would be that the courts would have to deal with only one kind of action for the losses encompassed in loss of working capacity. Damages would be calculated on the same principles regardless of whether and when the victim dies.[100] The law would thus be greatly simplified, and, at least with respect to the earning capacity component of a claim arising out of lost working capacity, consideration of many of the contingencies respecting what a deceased victim might have contributed to a family member would be obviated. The courts would be relieved of the difficult and distasteful task of estimating the chance of the formation by the claimant of future relationships of dependency. The typical case has been the remarriage of a widow, but the same principles apply to widowers, and to children who are or may be adopted—or supported—by others. The claim being that of the estate, the stability of the former family relationship would become irrelevant in an action for loss of future earnings.

There would be other benefits. The potential overlap with Part V claims under the *Family Law Act, 1986* would be eliminated, although it should be noted that this problem, like the relevance of the possible future formation of dependency relationships, referred to above, could be solved by specific amendments to existing legislation. The proposed framework would also be more consistent with modern views of family relationships than the existing law, which is based on the assumptions of 1846, namely, that an earner owed a duty of support to his wife and children and had a corresponding right to their services.[101]

(b) Claims for Guidance, Care and Companionship

Turning to claims for guidance, care and companionship now available to specified third parties under section 61(2)(e) of the *Family Law Act, 1986*, the scheme outlined above contemplates the replacement of such third party claims with a first party claim for loss of the ability to provide care and guidance, which would survive death. Loss of companionship, in our view, raises different considerations and will be dealt with below. While this approach would be a major conceptual change from the existing law, we believe it has many advantages.

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[100] See Waddams, "Damages for Wrongful Death: Has Lord Campbell's Act Outlived its Usefulness?" (1984), 47 Mod. L. Rev. 437, at 441.

[101] In this respect, see Waddams, *ibid.*, at 449-50.

Earlier, we explained our view that the capacity to provide guidance and care is closely related to other productive capacities, the loss of which are compensable at law, namely, the capacities to earn and to perform household services. Conceptual consistency suggests, then, that the three types of capacity be treated similarly.

The provision of guidance and care connotes a relationship, certainly, and persons other than the victim are affected. Nonetheless, as we have stated, we believe, as a matter of principle, that it is right to view the losses arising from an injury as belonging primarily to the injured person. In the case of a non-fatal injury, she will be able to distribute the award as she chooses, just as she would have been free to choose how to give guidance and care had the injury not occurred. In the case of a fatal injury, we consider that our scheme of distribution, proposed in a later section of this chapter,[102] will generally channel awards to those who would have benefited from the guidance and care of the deceased.

In the preceding section of this chapter, we discussed the difficulties that have arisen as a result of the enactment, and subsequent interpretation, of Part V of the *Family Law Reform Act, 1978*. It will be recalled that section 60(2)(d) of that Act (now section 61(2)(e)) has been interpreted as permitting compensation for a type of non-pecuniary loss, which, while theoretically not extending to grief and mental anguish, is indistinguishable from a type of solatium and depends upon evidence concerning the nature of the relationship between the claimant and tort victim. Moreover, because the 1978 legislation extended a right of action to non-fatal injuries and expanded the class of statutory claimants to include brothers and sisters, a substantial number of claims may now be made for losses that were formerly not recognized. The large number of potential claimants, and the fact that each is entitled to bring her own action, have created a system of open-ended liability that causes difficulty with respect to the settlement of claims and increases costs. In addition, results in individual cases may, when taken together, suggest an unrealistic capacity on the part of the victim.

In attempting to resolve these problems, the Commission gave consideration to a suggestion by the Canadian Bar Association—Ontario that the legislation should be amended to apply only to losses of a serious or permanent nature.[103] We are concerned, however, that this would add a new question to be litigated, namely, the meaning of "serious or permanent", and it is not at all clear that it would achieve its desired objective. The effect might well be to inflate some claims so as to bring them within whatever criteria of serious or permanent were established, as one way of indicating that a claim is serious is to put a high dollar value on it.

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[102] *Infra*, this ch., sec. 8.

[103] Canadian Bar Association—Ontario, Committee to Review Problems in the Casualty Insurance Industry, *supra*, note 87, at 6.

The Commission also considered the possibility of permitting conventional, or fixed sum, awards for non-pecuniary relational losses. This approach has been adopted in Alberta[104] and in England,[105] and would have the advantages of introducing predictability and consistency into this area of the law, and avoiding the distasteful necessity of hearing evidence to establish individual losses. However, some might object that this would amount to the Legislature putting a dollar value on life. Certainly, any dollar amount would be arbitrary.

Accordingly, we have opted in favour of abolishing third party claims for guidance, care and companionship, and replacing such claims with a

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[104] Section 8(2) of the Alberta *Fatal Accidents Act*, R.S.A. 1980, c. F-5, provides as follows:

> 8.—(2) If an action is brought under this Act, the court shall, without reference to any other damages that may be awarded and without evidence of damage, give damages for bereavement of
>
> (a) $3000 to the spouse of the deceased person,
>
> (b) $3000 to the parent or parents of the deceased child, to be divided equally if the action is brought for the benefit of both, and
>
> (c) $3000 to the minor child or children of the deceased parent, to be divided equally among the minor children for whose benefit the action is brought.

[105] Section 1A of the U.K. *Fatal Accidents Act 1976*, *supra*, note 23, as added by the *Administration of Justice Act 1982*, *supra*, note 9, provides as follows:

> 1A.—(1) An action under this Act may consist of or include a claim for damages for bereavement.
>
> (2) A claim for damages for bereavement shall only be for the benefit—
>
> (a) of the wife or husband of the deceased; and
>
> (b) where the deceased was a minor who was never married—
>
> (i) of his parents, if he was legitimate; and
>
> (ii) of his mother, if he was illegitimate.
>
> (3) Subject to subsection (5) below, the sum to be awarded as damages under this section shall be £3,500.
>
> (4) Where there is a claim for damages under this section for the benefit of both the parents of the deceased, the sum awarded shall be divided equally between them (subject to any deduction falling to be made in respect of costs not recovered from the defendant).
>
> (5) The Lord Chancellor may by order made by statutory instrument, subject to annulment in pursuance of a resolution of either House of Parliament, amend this section by varying the sum for the time being specified in subsection (3) above.

In *Current Law Statutes Annotated 1982* (1983), at 53-17, it is stated that the claim for damages for bereavement is "entirely new and follows the limited recommendations of the 1973 Report of the Law Commission (Law Com. No. 56, H.C. 373) rather than the broader recommendations, for 'loss of society' awards, of the Pearson Commission ((1978), Cmnd. 7054)". This limited claim for bereavement is in addition to any claim for lost financial support under the Act.

first party claim for loss of the capacity to provide care and guidance, which would survive death. We would not permit a claim for loss of the capacity to provide companionship. In our view, such a claim is incompatible with the concept of the loss as that of the injured person. Moreover, prior to the enactment of the 1978 Act, loss of companionship, unlike loss of care and guidance, was not considered a pecuniary loss for which compensation was available under the principles in *The St. Lawrence & Ottawa Railway Co. v. Lett* and *Vana v. Tosta*,[106] and its inclusion in the 1978 legislation has undoubtedly contributed to the characterization of such losses as non-pecuniary.

We would also restrict the class of persons in respect of whom loss of the ability to provide care and guidance may be claimed to spouses, dependent children and dependent parents. "Spouses" we would define as spouses within the meaning of Part III of the *Family Law Act, 1986*. "Dependent children" would include minors, and children who have attained the age of majority who have a reasonable expectation of receiving substantial pecuniary benefit[107] from the injured or deceased person. Parents with a reasonable expectation of receiving substantial pecuniary benefit also would be considered "dependent".

A number of advantages would, we believe, attend the foregoing changes. First, although not eliminated entirely, the need to investigate the nature of the relationship between the provider and the recipient of care and guidance should be much diminished, as the loss would be that of the tort victim and would be compensable only with respect to a restricted class of person.

Secondly, while it is impossible to guarantee against compensation for non-pecuniary loss, the fact that the loss would be characterized as that of

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[106] In *Mason v. Peters*, *supra*, note 34, at 32, the Court of Appeal stated (emphasis added):

> Damages in the nature of a compassionate allowance, or as solatium for grief or mental anguish, or for loss of society or companionship caused by the untimely death are not measurable in pecuniary terms and, although undoubtedly real, are not recoverable. But the strict pecuniary standards have been modified in this province, at least to the extent that the loss of care and guidance suffered by a child as a result of a mother's death has been held capable of evaluation on a monetary basis and thus compensable as a pecuniary loss under the *Fatal Accidents Act*: *Vana v. Tosta*; *St. Lawrence R. Co. v. Lett*. On the other hand, in England the loss of a mother's care and guidance has not been treated as an item of pecuniary damages for which recovery may be awarded.... *In neither jurisdiction has a loss of companionship been included in the category of pecuniary loss. Like the loss of parental or filial love or the loss of the joys of a happy home, the loss of those benefits of association in a family unit which may be included under the heading of 'companionship' has not been considered a pecuniary loss for which compensation may be granted under the Fatal Accidents Act*.

[107] We expect that the term "pecuniary benefit" would be given a broad interpretation, in keeping with the meaning assigned to the word "pecuniary" in *The St. Lawrence & Ottawa Railway Co. v. Lett*, *supra*, note 28; *Vana v. Tosta*, *supra*, note 31; and *Julian v. Northern and Central Gas Corp. Ltd.*, *supra*, note 21. Thus, for example, household help given to a parent by a child would constitute a pecuniary benefit.

the tort victim, rather than of third parties, and that loss of companionship would not be compensable, would tend to restrict compensation to provable pecuniary loss.

Perhaps most importantly, the present system of multiple proceedings would be avoided: there would be one action, in which the claims in respect of a restricted class of persons would be determined with reference to the obviously limited capacity of the injured or deceased person to provide care and guidance. We would anticipate that, over time, conventional amounts would be awarded under the head.

(c) Possible Objections

Two lines of objection have been raised to our proposal to abolish all third party claims in favour of a first party claim for loss of working capacity that would survive death. The first is that family members may be undercompensated. In the context of non-fatal injuries, however, our proposal would leave the injured person with the same discretion respecting the level of provision to family members as she would have had but for the accident. Accordingly, we do not consider that family members would be undercompensated in these circumstances. In the case of fatal injuries, we shall make recommendations in a subsequent section of this chapter concerning how damages received by an estate should be distributed so as to benefit those persons who would likely have benefited from the deceased's working capacity but for the accident.[108]

The opposite objection is that, where there are no dependants, the estate would be overcompensated. In our view, however, the proposed rights of recovery by the estate are consistent with the general principle of survival of actions. In this vein, compensation received by an estate in respect of loss of working capacity may be likened to any other recovery by an estate through a survival action.[109] Indeed, objections to recovery by the estate for loss of working capacity may be understood as objections to the basic notion of inheritance of wealth. As Waddams has observed,[110] the proposed scheme is not different in this respect from the current legal position when an injured person recovers in respect of lost earning capacity and then dies unexpectedly. Either way, the estate is enriched without regard to whether expectations of support were held by third parties.

We would add that our recommendations for assessment of damages to be awarded to an estate in respect of lost working capacity will provide for deductions for what the deceased would have spent on herself. It will be seen that in the case of a deceased with no dependants, for example, a child, these

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[108] *Infra*, this ch., sec. 8.

[109] Waddams, *supra*, note 100, at 441-42.

[110] *Ibid.*

would be considerable, and recovery by the estate would be restrained accordingly.[111]

(d) Conclusions

In conclusion, we recommend[112] the repeal of section 61 of the *Family Law Act, 1986*, providing for recovery by certain family members of their pecuniary losses resulting from wrongful injury to or death of another person. More particularly, we recommend repeal of section 61(2)(e), providing for recovery by specified family members for loss of the guidance, care and companionship that would have been received if the death or injury had not occurred. In chapter 4 of this Report, we shall address claims permitted under section 61 by a third party for certain direct expenses and for the value of services provided, and shall recommend that these be abolished as well. Taken together, these proposals amount to a recommendation that Part V of the *Family Law Act, 1986* be repealed.[113]

Finally, we recommend that legislation be enacted that would clearly provide for survival of actions in respect of loss of working capacity.[114] Loss of working capacity should be defined to mean loss of productive capacity, including loss of the capacity to earn, to provide care and guidance to a spouse, dependent children or dependent parents of the injured or deceased person, and to provide household services.[115]

We have already discussed the capacity to provide care and guidance. In the next two sections, we look more closely at the other two capacities that we would include in the term "working capacity".

5. EARNING CAPACITY

(a) Current Law

There has been considerable debate as to whether compensation for loss of future income should be categorized as compensation for actual proven future losses, or as compensation for loss of a capacity to earn income.[116] The former characterizes the plaintiff's loss as the future stream

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[111] See *infra*, this ch., sec. 7(c).

[112] One of the Commissioners, Mrs. Margaret A. Ross, dissents from certain of the following recommendations: see *infra*, this ch., sec. 10.

[113] See the draft *Personal Injuries Compensation Act* proposed by the Commission (hereinafter referred to as "draft Compensation Act"), *infra*, Appendix 1, s. 17.

[114] *Ibid.*, ss. 3(1) and 4(1)(a).

[115] *Ibid.*, s. 5. See s. 1 for the definitions of "spouse", "dependent child" and "dependent parent".

[116] See, generally, Cooper-Stephenson and Saunders, *supra*, note 2, at 196-204, and Waddams, *supra*, note 20, para. 395, at 228.

of income that the plaintiff would have earned over the course of her life and that she now will be unable to earn. The latter treats the loss as one of a capital asset, namely, the capacity to earn. Although the courts frequently use these two terms interchangeably and do not advert to the potential differences between them, the choice of one over the other can have an important impact in some types of case.

Canadian law on this point starts with the Supreme Court judgment in *The Queen in right of Ontario v. Jennings*,[117] in which it was decided that compensation under this head of damages is for loss of the capacity to earn income, which is to be treated as a capital asset that must be valued. The issue in *Jennings* was whether tax should be deducted from the damage award, so that it could be argued that it is only for this purpose that the loss is to be viewed in this way. This characterization was, however, reiterated more recently in *Andrews v. Grand & Toy Alberta Ltd.*,[118] where it was used primarily to justify awarding compensation for the loss of earnings over the plaintiff's pre-accident working life expectancy.

Despite these characterizations, in the typical case, the starting point in calculating damages is what the plaintiff was actually earning at the time of the accident. The court must then determine the probability that the plaintiff would have increased her earnings over the years due to promotion or the benefits of seniority, or that they would have been diminished by lay-off or ill health.[119] In this respect the task looks like it is designed to assess how much the plaintiff would actually have earned over her working life if the injury had not occurred.

The task is much more speculative in the case of young adults who have not yet chosen a career path and infants whose talents and capabilities have not yet been fully developed, but the approach is essentially the same. Based on the information that the court does have about the plaintiff, it must decide as best it can what kind of occupation she is likely to have pursued and what her level of earnings likely would have been if not for the injury.[120] This has led some commentators to argue that, despite the courts' use of the terminology of "loss of earning capacity", damages are really being determined according to the loss of earnings approach.[121] It is argued that the adoption of the loss of earning capacity approach would require the courts to consider what the plaintiff *could* have earned given her capabilities if she were to put her talents to the best possible use. Instead, the court is simply

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[117] *The Queen in right of Ontario v. Jennings*, [1966] S.C.R. 532, 57 D.L.R. (2d) 644 (subsequent references are to [1966] S.C.R.).

[118] *Supra*, note 94.

[119] See Cooper-Stephenson and Saunders, *supra*, note 2, at 244-49, and Waddams, *supra*, note 20, para. 396, at 229-30.

[120] This is discussed in more detail later in this section.

[121] Cooper-Stephenson and Saunders, *supra*, note 2, at 196-204.

asking the hypothetical question, "What would this plaintiff probably have earned over the course of his working life?", and this really amounts to regarding the loss as that of the stream of earnings that she would have received if the injury had not occurred. This is essentially the loss of earnings approach.

The choice of approach is most significant in cases in which the plaintiff had been underemployed by choice or was performing work for which no remuneration was received. The latter cases are especially dramatic because, if the loss of earnings approach were used, the plaintiff would receive no compensation under this head because she would have received no earnings even if the injury had never occurred. With the exception of cases involving full-time homemakers, very few of these cases are reported.

In *Turenne v. Chung*,[122] the plaintiff was a teaching sister in a religious order who had directed that her salary be paid to her order. The defendant argued that, since she suffered no actual loss of earnings, she should receive no compensation under this head of damages. Damages were nevertheless awarded on the ground that the plaintiff was entitled to do anything she wished with her earnings, including give them away.[123] On the other hand, in *Varkonyi v. C.P.R.*,[124] the plaintiff had been a self-employed drywaller. For several years prior to the accident he had been working only about half the year, devoting the remainder of his time to leisure pursuits. Although the Court invoked the concept of loss of earning capacity to describe the plaintiff's loss, Kerans J. declined to award compensation for what he could have earned if he were to work full time. He stated that "[w]hile he has lost the capacity, the value of that loss to him is lessened substantially if it is not likely that he would have taken advantage of it".[125]

Turning to the much more common case of the homemaker, it is clear that on a straightforward loss of earnings approach, homemakers would receive no compensation under this head of damages in respect of periods of time during which they would not have participated in the paid labour force. While the tasks of the homemaker are things for which there is a market, and while some people do earn their livelihood in this way, typically when such tasks are performed for one's family, no wages are paid. On the loss of earning capacity approach, on the other hand, compensation could arguably be awarded for what the plaintiff could have earned, even if she was not actually earning or planning to earn wages.[126] In fact, as will be discussed,

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[122] (1962), 36 D.L.R. (2d) 197, 40 W.W.R. 508 (Man. C.A.) (subsequent references are to 40 W.W.R.).

[123] *Ibid.*, at 509.

[124] (1981), 26 A.R. 422 (Q.B.).

[125] *Ibid.*, at 442.

[126] For discussion, see Cooper-Stephenson and Saunders, *supra*, note 2, at 196-97, and Waddams, *supra*, note 20, paras. 402-09, at 233-36.

the courts have not compensated homemakers in respect of periods of time during which they would have worked in the home by reference to earning capacity.[127]

For analytical purposes, we distinguish between compensation in respect of the period of time during which the injured or deceased person would have, but for the injury or fatality, worked in the paid labour force, and compensation in respect of the period of time during which she would have worked in the home. The former type of compensation is addressed in this section. The latter type of compensation should, we believe, recognize the intrinsic value of the housekeeping capacity, and is discussed in the next section.

Until recently, there was very little discussion of compensation for homemakers in the case law. Cooper-Stephenson and Saunders comment that, in the past, female claimants generally, and homemakers in particular, were seriously undercompensated under this head of damages.[128] In recent years, however, the courts have become somewhat more sensitive to the issue of fair compensation for loss of earnings, or earning capacity, for homemakers, but the grounds on which damages are awarded are often unclear.

The most obvious changes in the case law have been with respect to the treatment of the wage earning potential of homemakers who were not in paid employment at the time the injury occurred and of young unmarried female plaintiffs. With respect to the former situation, it is no longer assumed that a married woman would never have taken paid employment merely because she was not so employed at the time of the accident. In *McLeod v. Palardy*,[129] the Court estimated the total wages that someone with the plaintiff's characteristics would likely be able to earn and then discounted this by the likelihood that she would only have worked part-time for much of her life because of her family responsibilities. This approach seems consistent with the loss of earnings approach because the result is to compensate the plaintiff only for what she probably would have earned if not for the injury, and not for what she could have earned by devoting herself to full-time paid employment.

Illustrating the new attitude to young unmarried female plaintiffs, Spence J. stated, in *Arnold v. Teno*, as follows:[130]

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[127] *Infra*, this ch., sec. 6(a).

[128] *Supra*, note 2, at 207-16.

[129] (1981), 10 Man. R. (2d) 181, 124 D.L.R. (3d) 506 (C.A.). The plaintiff was a thirty-one year old woman with six children.

[130] *Arnold v. Teno*, [1978] 2 S.C.R. 287, at 329, 83 D.L.R. (3d) 609 (subsequent references are to [1978] 2 S.C.R.).

> I do not think we can assume that a bright little girl would not grow up to earn her living and would be a public charge, and we are not entitled to free the defendants, who have been found guilty of negligence, from the payment of some sum which would be a present value of the future income which I think we must assume the infant plaintiff would earn....

While this passage indicates the abandonment of the assumption that all women marry and are supported by their husbands, there is still cause to question whether the compensation under this head in the case was adequate. To begin with, the Court settled on a damage award for loss of earnings or earning capacity at half way between the poverty level and the salary that the plaintiff's mother earned as a teacher. This seems significantly lower than a similarly situated male plaintiff would have received.[131] Secondly, Spence J. also seemed to be relying on the alternative ground that "like everyone else, the infant plaintiff has to eat, clothe herself and shelter herself".[132] Although this is true of everyone, both male and female, courts would not tend to base damage awards to male plaintiffs merely on the plaintiff's basic necessities. Given that the actual amount of the award in *Arnold v. Teno* merely coincided with the cost of basic necessities, it may be asked whether the Court was deciding on the basis of loss of earnings or earning capacity at all.

This reasoning is more explicitly relied upon in *Fenn v. City of Peterborough*.[133] The case involved a married woman who had been a full-time homemaker but who had separated from her husband due to the stress created in their relationship because of her extensive disability. The Court clearly treated lost earning capacity and basic living expenses as alternative grounds for the award and arrived at a sum of $6,000 per year.

Different approaches have been taken in the English cases. In *Moriarty v. McCarthy*,[134] O'Connor J. acknowledged that the plaintiff was unlikely to earn as much in wages over her lifetime as a man would have because she was likely to have married and withdrawn from the labour market for at least a time. However, his Lordship went on to note that this would result in insufficient compensation because it failed to take into account the support the plaintiff would have received from a husband during the time that she was not in paid employment. The proposed solution was to compensate the

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[131] Cooper-Stephenson and Saunders, *supra*, note 2, at 211, draw the comparison between the award in this case and those in the two other cases in the "trilogy" of 1978, *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, note 94, and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480. Although Diane Teno received $7,500 per year, the award in *Andrews* was $14,400 per year, and in *Thornton* was $10,200 per year.

[132] *Supra*, note 130, at 327.

[133] (1979), 25 O.R. (2d) 399, 104 D.L.R (3d) 174 (C.A.), aff'd on other grounds, [1981] 2 S.C.R. 613, 129 D.L.R. (3d) 507.

[134] [1978] 1 W.L.R. 155, [1978] 2 All E.R. 213 (Q.B.).

plaintiff for loss of prospects of marriage at approximately the same rate at which she would have been compensated for lost earnings.

This clearly moves damages for loss of marriage prospects out of the realm of non-pecuniary damages and treats marriage as an alternative source of income for women. It would seem to follow from this that, in the case of an already married woman whose marriage does not break down because of the injury, the plaintiff would receive no compensation under this head because her husband continues to support her. However, in an unreported case, *Carrick v. Camden London BC*,[135] the same judge, O'Connor J., took the view that it was simpler to disregard the intervention of marriage because, even if the plaintiff had married and ceased paid employment in favour of housekeeping, she would still have been working or producing an economic gain. This latter approach was followed in *Hughes v. McKeown*,[136] and is suggestive of compensation for loss of the housekeeping capacity itself. As indicated above, compensation recognizing the intrinsic value of the capacity to provide household services is analytically distinct from compensation in respect of loss of earning capacity, and is discussed in the next section.

One further subject, adverted to above, requires elaboration, namely, compensation for loss of earning capacity suffered by infant plaintiffs. The younger a child is, the more difficult it is to predict how she would have used her capacities. In the case of a young adult, she may already have job plans and have taken steps toward training for a certain occupation even though she is not yet employed. In such cases, damages tend to be based on the average wage in that trade or occupation, subject to any discount required to take account of the chance that the plaintiff might not have completed her training, or might have been unable to find a job in that field.[137] This would seem to apply even when the plaintiff had planned a very lucrative and exclusive occupation, although the difficulty of successfully entering such occupations commonly leads the courts to discount the award heavily because of the possibility that the plaintiff might not have succeeded in her goal.[138]

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[135] Unreported (July 25, 1979, Q.B.).

[136] [1985] 1 W.L.R. 963, [1985] 3 All E.R. 284 (Q.B.). A similar approach was taken by Murphy J. in *Sharman v. Evans* (1977), 138 C.L.R. 563 (H.C.), at 598, but this is a dissenting judgment. The majority also did not reduce the female plaintiff's award for loss of working capacity because of the possibility that she might have married, but they preferred to base this decision on the expediency of ignoring the plaintiff's marriage prospects in view of the speculative nature of such a judgment on the facts of the case.

[137] *Conklin v. Smith*, [1978] 2 S.C.R. 1107, 88 D.L.R. (3d) 317; *McKay v. Board of Govan School Unit No. 29 of Saskatchewan*, [1968] S.C.R. 589, 68 D.L.R. (2d) 519; and *McErlean v. Sarel*, unreported (September 29, 1987, Ont. C.A.).

[138] *Daigle v. Theo Couturier Ltd.* (1973), 6 N.B.R. (2d) 679, 43 D.L.R. (3d) 151 (C.A.); *Hearndon v. Rondeau* (1984), 54 B.C.L.R. 145, 29 C.C.L.T. 149 (C.A.); *Clinton v. County of Hastings* (1923), 53 O.L.R. 266 (App. Div.), aff'd [1924] S.C.R. 195, [1924] 2 D.L.R.

In the case of younger children, who have not yet formulated a career plan, the courts look at any evidence as to the child's capabilities. Degree of success in school is important in this regard.[139] The most difficult cases are those of very young children who have not yet displayed any particular aptitude.[140] There seems to be no doubt that many such plaintiffs are undercompensated. In some cases, no award was made at all under this head.[141] In others, the award was barely above subsistence level.[142] Even in *Arnold v. Teno*,[143] discussed above, where the Supreme Court of Canada recognized the necessity of making an award under this head even for young children, the amount arrived at was not far above the poverty level. The result of the current approach is that infant plaintiffs generally receive much lower awards for loss of earning capacity than most adult plaintiffs.

(b) Recommendations

Existing law has not differentiated clearly between loss of earnings and loss of earning capacity. Although we view the latter characterization as preferable, we consider that, generally, results have tended to be fair and reasonable. The cases of women and children, however, deserve comment.

Our examination of current law reveals a tendency on the part of the courts to undervalue the earning capacity of women. At the same time, we note that the courts have abandoned the assumptions that women are likely to marry and, once married, are likely not to take paid employment. Thus, the courts are prepared to consider the degree to which a homemaker or unmarried woman would have participated in the paid work force, and the level of earnings she might have expected to obtain. In light of this, we do not believe that legislation is warranted at this time. In our view, it is well within the capacity of the courts to effect the necessary adjustments in levels of compensation on the basis of existing principles. As already stated, the

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217; and *VanCamp v. Anderson* (1928), 63 O.L.R. 257, [1929] 1 D.L.R. 429 (App. Div.), rev'd on other grounds [1930] S.C.R. 156, [1929] 4 D.L.R. 625. But see *Schicchi v. Gronow* (1985), 62 B.C.L.R. 174 (C.A.), suggesting that, unless the plaintiff can establish on a balance of probabilities that she would have achieved her goal, the measure of compensation should not be based on that occupation, but on something more attainable.

139 *Bogusinski v. Rashidagich*, [1974] 5 W.W.R. 53 (B.C.S.C.), and *Floyd v. Bowers* (1978), 21 O.R. (2d) 204, 89 D.L.R. (3d) 559 (H.C.J.), var'd (1979), 27 O.R. (2d) 487, 106 D.L.R. (3d) 702 (C.A.).

140 *Jones v. Lawrence*, [1969] 3 All E.R. 267 (Assizes), and *S. v. Distillers Co. (Biochemicals) Ltd.*, [1970] 1 W.L.R. 114, [1969] 3 All E.R. 1412 (Q.B.).

141 *Loney v. Voll*, [1974] 3 W.W.R. 193 (Alta. S.C., T.D.), and *Connolly v. Camden and Islington Area Health Authority*, [1981] 3 All E.R. 250 (Q.B.).

142 *Wipfli v. Britten* (1984), 56 B.C.L.R. 273, 13 D.L.R. (4th) 169 (C.A.). Leave to appeal to the Supreme Court of Canada was granted: (1985), 13 D.L.R. (4th) 169*n*.

143 *Supra*, note 130.

question of compensation for loss of capacity to provide household services is addressed separately, below.[144]

Turning to compensation for loss of earning capacity by children, we are concerned that infant plaintiffs tend to receive considerably less compensation under this head than do adult plaintiffs. It cannot be the case that all young plaintiffs would have achieved little better than subsistence earnings if they had remained uninjured. Nonetheless, we do not recommend legislative reform in this context. In reaching this conclusion, we bear in mind that assessment of a child's loss of earning capacity is unavoidably speculative. We would add, however, that there is no reason why the courts should not make use of the best statistical means available to guide the effort. As social science information and methods become more sophisticated there should be an increasing degree of accuracy in the prediction of such matters.

A more specific question involves loss of the capacity to earn an annuity, pension, or the like. The problem may arise under the present law where the defendant wrongfully reduces the plaintiff's life expectancy, and will arise more frequently under our proposal for the replacement of Part V of the *Family Law Act, 1986*. As we observed earlier, it is well established that, in case of reduction of life expectancy, compensation for loss of earning capacity is to be based on the plaintiff's pre-accident life expectancy.[145] It has been held, also, that compensation is available for loss of pension earning capacity.[146] Most of the cases, however, involve impairment of a person's capacity to work. In order to put the matter beyond doubt, we recommend that legislation provide that compensation for loss of working capacity may include compensation for loss of entitlement under a pension, annuity, or similar instrument.[147]

6. CAPACITY TO PROVIDE HOUSEHOLD SERVICES

(a) CURRENT LAW

The primary way in which current law recognizes loss of capacity to provide household services is through awards to third parties for their own losses.[148] Third party claims of this kind were discussed earlier in this

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[144] *Infra*, this ch., sec. 6.

[145] *Supra*, this ch., sec. 5(a).

[146] *Lamont v. Pederson* (1981), 17 Sask. R. 18, [1981] 2 W.W.R. 24 (C.A.); *Lewis v. Todd*, [1980] 2 S.C.R. 694, 115 D.L.R. (3d) 257 (retirement benefit); *Keddy v. Minshull* (1969), 1 N.S.R. 1965-69 418, 5 D.L.R. (3d) 156 (N.S.S.C., T.D.); *Julian v. Northern and Central Gas Corp. Ltd.*, *supra*, note 21, at 397; and *Smith v. Canadian Pacific Ry. Co.* (1963), 41 D.L.R. (2d) 249, 45 W.W.R. 170 (Sask. Q.B.).

[147] Draft Compensation Act, s. 5(2)(c).

[148] Cooper-Stephenson and Saunders, *supra*, note 2, at 213-16.

chapter.[149] It will come as no surprise that we do not consider this to be a satisfactory approach to loss of the capacity to provide household services, as it fails to address the primacy of the victim's own loss. The injured provider of household services is deprived thereby of the right to make choices about how to provide to those around her.

There are, as well, a number of cases that have allowed some compensation to the victim in respect of impaired housekeeping ability, although without articulating a general approach to the matter. Thus, loss of housekeeping capacity has been compensated sometimes as part of a cost of care award,[150] sometimes under the head of loss of amenities of life and pain and suffering,[151] and sometimes, without much discussion, as part of a global assessment of damages.[152] There is, however, no clear or reliable basis for recovery by a victim in respect of loss of capacity to provide household services. This state of affairs has led Cooper-Stephenson and Saunders to observe that existing law respecting compensation for impaired housekeeping capacity leaves a "vacuum in the damages awarded to female plaintiffs", which should be filled.[153] We agree, and would add that loss of housekeeping capacity on the part of male plaintiffs should also be recognized in damages awards. Below, we make recommendations to this effect.

Almost as important as the question of whether a claim for loss of housekeeping capacity may succeed is the question of how the loss should be valued. Existing law on this point has developed in the context of third party claims for loss of services. In the 1976 case of *Franco v. Woolfe*,[154] the Ontario Court of Appeal rejected evidence by an economist that the Court characterized as going to the "contribution that the average Canadian housewife makes to the gross national product", and stated as follows:[155]

> In assessing damages for the death of a wife, the Court must determine the value of the services rendered by a particular wife to a particular husband;

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[149] *Supra*, this ch., sec. 2(b)(ii)d.

[150] See, for example, *Fenn v. City of Peterborough*, *supra*, note 133, and *McLeod v. Palardy*, *supra*, note 129. Cooper-Stephenson and Saunders have pointed out that awards for cost of care do not normally include compensation for loss of capacity to provide services to persons other than the victim: *supra*, note 2, at 214. As such, this is at best a very partial way of compensating for impaired housekeeping capacity. It is particularly inadequate where there is no third party able to claim for loss of services.

[151] See, for example, *Daly v. General Steam Navigation Co. Ltd.*, [1981] 1 W.L.R. 120, [1980] 3 All E.R. 696 (C.A.), and *Lefebvre v. Kitteringham* (1985), 39 Sask. R. 308 (Q.B.), both with respect to loss of housekeeping capacity in the pre-trial period.

[152] See, for example, *Strong v. Laughlin*, [1973] 1 W.W.R. 289 (B.C.S.C.), and *Rietze v. Bruser (No. 2)*, [1979] 1 W.W.R. 31 (Man. Q.B.).

[153] *Supra*, note 2, at 216.

[154] (1976), 12 O.R. (2d) 549, 69 D.L.R. (3d) 501 (C.A.) (subsequent references are to 12 O.R. (2d)).

[155] *Ibid.*, at 551.

> evidence of the value of the services rendered by the average Canadian housewife to the average Canadian husband is irrelevant to this determination.

In assessing the value of lost services, however, the Court considered that the cost resulting from the hiring of a housekeeper could be taken into account.[156] To this end, the evidence of an employee of a domestic employment agency was considered admissible.

This position was reaffirmed in *Nielsen v. Kaufmann*,[157] in which the Court of Appeal quoted the following passage from Waddams, *The Law of Damages*,[158] with approval:[159]

> It is universally accepted that the cost of hiring reasonable services on a commercial basis to replace lost domestic services is an allowable claim.

Once again, the evidence of an economist was rejected as being too general, and that of an employee of an employment service was admitted.

It is not clear to us why economic evidence should be considered less specific, or relevant, than evidence of the cost of hiring a housekeeper.[160] We would emphasize that the practical result of the current position is that the value that is placed by law on household work is severely limited. In the next section, we look beyond the case law and discuss possible approaches to the valuation of household services.

(b) Approaches to Valuation: Opportunity Cost vs. Replacement Cost as the Measure of Damages

Debate in the academic community on how to evaluate loss of the ability to provide household services has tended to focus on two possible approaches: the "opportunity cost" method of assessment and the "replacement cost" measure.[161] The former assumes that, if an individual is faced with a choice between working in the home for no pay and taking a job outside the home at $15.00 per hour, her choice to stay home to work indicates that she values this activity at least as much as the amount she could earn in the workforce. If she did not so value homemaking, the rational individual would take the paid employment instead. Therefore, it is

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[156] *Ibid.*, at 552. See, also, *Griffiths v. Canadian Pacific Rys.* (1978), 6 B.C.L.R. 115 (C.A.).

[157] *Supra*, note 39.

[158] *Supra*, note 20, para. 710, at 711.

[159] *Supra*, note 39, at 196.

[160] See Finlay, "Household Services and the Ontario Court of Appeal" (1987), 8 Advocates' Q. 320, at 330-32, for a critique of the distinction.

[161] See, generally, Komesar, "Toward a General Theory of Personal Injury Loss" (1974), 3 J. Legal Stud. 457, and Yale, "The Valuation of Household Services in Wrongful Death Actions" (1984), 34 U. Toronto L.J. 283.

argued that the value of her homemaking services should be assessed at the value of other opportunities (in this case, paid employment) that she forgoes in order to be a homemaker.

The alternative approach is to assess the loss according to what it would cost to replace the services that the homemaker can no longer perform. Two means of assessing this cost have been suggested in the literature.[162] The first is the "substitute homemaker" approach, which seeks to determine how much it would cost to employ a person of the plaintiff's qualifications to do the things she used to do. The second is to compile a catalogue of the various services that the plaintiff used to perform, determine how many hours she spent on each of them, and assess the loss with reference to how much it would cost to hire someone on an hourly basis to perform each of those tasks. Numerous studies have been done to estimate the value of the average homemaker's work using the catalogue of services approach.[163]

The main objection to the opportunity cost approach, and one that strongly disposes us against it, is that it may result in different levels of compensation to two people who performed the same tasks with the same degree of skill. Despite the fact that their household work was identical, one homemaker who had the unused skill to be a professional would receive more in damages than another whose only alternative to homemaking was some form of unskilled labour.[164] Such a result strikes us as unfair. Certainly, two homemakers may fairly receive quite disparate awards for loss of earning capacity, in respect of any periods of time during which they might have been expected to participate in the paid work force. However, awards in respect of loss of housekeeping capacity should reflect the intrinsic worth of that capacity, not the value of a capacity that the homemaker chooses not to exploit for the period in question.

In addition, we are mindful of the speculative nature of valuing household services according to opportunities forgone. The approach could easily result in overcompensation if care were not taken to ensure that the forgone opportunities used to determine the award are opportunities that really were available to the plaintiff. Not only would there have to be

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[162] See Bruce, *Assessment of Personal Injury Damages* (1985), at 256-60; Cooper-Stephenson and Saunders, *supra*, note 2, at 218-25; and Newsom, "Torts—Wrongful Death—'How Much is a Good Wife Worth?' " (1968), 33 Mo. L. Rev. 462, discussing this issue in the context of fatal accident cases.

[163] Adler and Hawrylyshyn, *Estimates of the Value of Household Work, Canada, 1961, and 1971* (Institute for Economic Research, Queen's University, 1977); Hawrylyshyn, "The Value of Household Services: A Survey of Empirical Estimates" (1976), Review of Income and Wealth 101; Hawrylyshyn, *Estimating the Value of Household Work in Canada* (Statistics Canada, Office of the Senior Advisor on Integration, 1978); Kome and Pringle, *About Face: Towards a Positive Image of Housewives* (The Ontario Status of Women Council, 1977); and Proulx, *Women at Work: Five Million Women, A Study of the Canadian Housewife* (Advisory Council on the Status of Women, 1978).

[164] Adler and Hawrylyshyn, *supra*, note 163, at 7, and Cooper-Stephenson and Saunders, *supra*, note 2, at 218.

good evidence that the plaintiff who says she gave up the opportunity to be an accountant actually had the ability and skills to be an accountant, but it would also be necessary to assess the chances that this kind of work would have been available to the plaintiff given existing conditions in the job market.

On the other hand, it is forcefully argued by supporters of the opportunity cost approach that the replacement cost method carries with it the danger of either undercompensating or overcompensating the plaintiff. Komesar has stated the requirements of an accurate assessment of value on the basis of replacement cost, and the difficulties involved, in the following terms:[165]

> In theory, such a system would provide an accurate measure of the loss to the extent that (1) all services were enumerated, (2) each was adjusted for the quality of the performance, and (3) a substitute market service could be identified. In fact, each of these conditions for accuracy presents substantial problems, especially the last two. It appears that, in practice, the valuation is limited to a few basic domestic services that have easily identifiable market substitutes. While such a system is superior to no evaluation, it is likely to underestimate seriously many losses.

There is also a concern expressed by some commentators that the replacement cost method will not adequately value the uniqueness of the injured homemaker's contribution.[166] Others have argued that the substitute housekeeper approach in particular will result in undercompensation, because the substitute will rarely perform all of the tasks, or work the number of hours, that the plaintiff did.[167] Conversely, it has been argued that, since it may take a small army of workers to replace the plaintiff, the cost will be out of proportion to the value realized.[168] This is especially relevant to the catalogue of services approach, as is the caution that, for the full-time homemaker, some of her enumerated jobs can be performed simultaneously.

We recognize a measure of validity in both the opportunity cost and the replacement cost approaches. We recognize as well that there is a lack of social consensus about the value that may reasonably be assigned to household work. Thus, to the extent that our recommendations for reform should reflect a social consensus, our task is very difficult indeed.

There is one important element of both approaches that we take as the starting point for our reform proposals in this area. That is, household work

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[165] Komesar, *supra*, note 161, at 480.

[166] Pottick, "Tort Damages for the Injured Homemaker: Opportunity Cost or Replacement Cost?" (1978-79), 50 U. Colo. L. Rev. 59, at 67-68.

[167] Cooper-Stephenson and Saunders, *supra*, note 2, at 224.

[168] Peck and Hopkins, "Economics and Impaired Earning Capacity in Personal Injury Cases" (1969), 44 Wash. L. Rev. 351, at 366.

has intrinsic and significant economic value. We are concerned that any reform proposal should clearly recognize this value. Moreover, the law should be framed in such a way that litigation costs and elements of subjectivity are minimized. With these goals in mind, we set out our specific recommendations in the next section.

(c) RECOMMENDATIONS

In arriving at our recommendations respecting household services, we are influenced more by practical than by theoretical considerations. We do not endorse the opportunity cost approach, primarily for reasons of fairness, outlined above.[169] With respect to the replacement cost approach, we are mindful that results in individual cases can be reached only after a great deal of evidence, at considerable expense, has been adduced. Moreover, we have already explained that the levels of compensation achieved in this way could easily be either inadequate or excessive.

While market approximations may be found for household services, there is in fact no paid labour market for the full array of household services performed by people in their homes and for their families. Thus, any assessment of the value of such services must be, to some extent at least, arbitrary and artificial. We favour, therefore, an approach to valuation that has reference to a standard that is both fair, in its recognition of the inherent value of household work, and simple to apply. We believe that the average weekly earnings statistics for Ontario provide such a standard. Accordingly, we recommend that compensation for loss of capacity to perform household services should be assessed with reference to the average weekly earnings in Ontario (industrial aggregate).[170]

Thus, in the case of a full time homemaker, compensation for complete loss of capacity to perform household services would be assessed on the basis of the full average weekly earnings figure. We believe that compensation on a weekly, as opposed to hourly, basis, would be appropriate. Average Ontario weekly earnings would also be the benchmark when valuing loss of capacity to perform household services by persons other than full time homemakers. It would be up to the courts to assure fair proportionality of awards as between full time and part time providers of household services, on a case by case basis.

Similarly, it would be up to the courts to achieve fair proportionality of awards in cases of partial, as opposed to complete, loss of capacity to

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[169] We recognize that this diverges from the position taken in this Commission's *Report on Motor Vehicle Accident Compensation* (1973), at 93, and 109, Recommendation 17. However, for the reasons that we have stated, we feel obliged to depart from the earlier position.

[170] Draft Compensation Act, s. 5(2)(b). The average weekly earnings (industrial aggregate) for Ontario is published monthly by Statistics Canada.

perform household services. Again, awards would be made with reference to average weekly earnings. However, we anticipate the possibility that, in cases of slight incapacity, replacement cost valuation might be more appropriate than selecting some fraction of the average weekly earnings figure. We consider that our recommendation is flexible enough to permit the courts to assess damages according to the replacement cost method of valuation in such cases.

In fact, our recommendation is in general terms precisely to permit this sort of flexibility. We considered recommending a more detailed statutory scheme. Such a scheme might, for example, distinguish between full time and part time homemakers, and between complete and partial loss of capacity to perform household services. However, it is our view that such distinctions are best left to be drawn by the courts, as cases come before them. A detailed legislative scheme in this area would not provide the latitude needed to respond appropriately to the varied fact situations that will undoubtedly arise.

We realize that difficulties may arise from time to time in distinguishing between care and guidance, on the one hand, and household services, on the other. Again, we would not wish to fix any rules on this question in legislation. Rather, we leave it to the courts to draw the appropriate distinctions in response to the cases that come before them.

Finally, we would emphasize that implementation of this recommendation would not alter or limit existing rights to compensation for loss of earnings or earning capacity in respect of any period of time during which an injured or deceased person would have, but for the injury or fatality, participated in the paid labour force.

7. DEDUCTIONS FROM WORKING CAPACITY

In a previous section of this chapter,[171] we made recommendations respecting the principles governing compensation for loss of an injured person's working capacity, which will apply regardless of whether death ensues from that injury. Determination of working capacity in accordance with these proposals, however, does not conclude the process of calculating this head of damages. This determination is but an initial step that renders a gross amount; certain deductions must be made in order to reflect more accurately the loss to the injured person or the estate, as the case may be. In this section, we shall discuss the treatment that should be given to the following three items: income taxation; the cost of earning; and personal living expenses. We turn first to the question of taxation.

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[171] *Supra*, this ch., sec. 4(d).

(a) Income Taxation

Of the three matters that we shall consider, income taxation is the most controversial. At issue is the appropriate approach to be taken to the fact that the plaintiff's income would have been subject to tax had an injury not occurred. The position in Canada differs from that in England and Australia, and, in Canada, a distinction is drawn between personal injury and fatal accidents.

In England, the decision of the House of Lords in *British Transport Commission v. Gourley*[172] firmly established that an award of damages for loss of earnings should be reduced by the amount that the plaintiff would have had to pay in income tax had he continued in his job, but that, as a matter of tax law, he would now be relieved of the obligation to pay. Invoking the compensatory purpose of a damages award, the Court was of the view that, since the plaintiff would not have had at his disposal his gross income, he could not claim gross income as his actual loss.

In *Gourley*, the House of Lords neglected to take into account the burden of taxation that would fall upon the investment income that would be produced by the award of damages. As a result, the plaintiff would be undercompensated.[173] The House of Lords subsequently rectified this deficiency in *Taylor v. O'Connor*,[174] which held that the award should be "grossed-up"[175] to produce an annual income that, after tax, would be the equivalent of the plaintiff's after-tax income before the injury.

In Australia, the English approach has been endorsed by the High Court of Australia[176] and enshrined in legislation in the States of Victoria[177] and Queensland.[178]

As we have indicated, the position in Canada is somewhat more complicated, as different approaches are taken in cases of personal injury and fatal accidents. With respect to personal injury cases, the Supreme

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[172] *British Transport Commission v. Gourley*, [1956] A.C. 185, [1956] 2 W.L.R. 41 (subsequent references are to [1956] A.C.).

[173] In *Gourley*, the award had been calculated to provide a lump sum that, when invested, would produce an annual income equal to the plaintiff's pre-injury, after-tax income. The plaintiff, however, would have been required to pay tax on at least the interest portion of that investment income, with the consequence that his disposable income would be less after the accident than it had been before.

[174] *Taylor v. O'Connor*, [1971] A.C. 115, [1970] 2 W.L.R. 472.

[175] "Grossing-up" an award of damages refers to the inclusion of an amount in the award to offset liability for income tax on income from investment of the award.

[176] *Cullen v. Trappell* (1980), 146 C.L.R. 1 (H.C.).

[177] *Wrongs Act* 1958, No. 6420, s. 28A, as en. by No. 9353, 1979, s. 2(b).

[178] *Common Law Practice Act, 1867-1981*, s. 4, as en. by No. 84 of 1978, s. 2.

Court of Canada has held that no deduction should be made from an award of damages in respect of lost earning capacity in order to reflect the fact that the plaintiff would have had to pay tax on his income, had the injury not taken place. In the leading case, *Jennings*,[179] the Court emphatically rejected the approach adopted by the House of Lords in *Gourley*; in later decisions, it reaffirmed its position with little discussion.[180]

By contrast, in fatal accident cases, the award of damages payable to a third party under the legislation is based on the deceased's after-tax earnings.[181] In holding that a deduction must be made in respect of the income tax that the deceased would have been obliged to pay, had he lived, the Supreme Court of Canada reversed its earlier position[182] that fatal accidents were to be treated like personal injury cases. Since the award is reduced to take account of the tax that would have been payable, it must then be "grossed-up" in order to ensure realization of a sum that will account for the fact that income tax will be payable in respect of the investment income earned by the award.[183]

Having set out this background, it remains to consider, first, whether the present rule should continue to govern cases of personal injury and, secondly, what approach should be taken to fatal accidents, in light of our proposal to repeal Part V of the *Family Law Act, 1986*.[184] In order to decide these matters, it would be instructive to review the underlying rationales of the existing positions.

In *Jennings*, Judson J. gave the judgment that addressed the tax issue in the greatest depth. His main reasons for rejecting the *Gourley* approach were three in number, and can be briefly summarized.[185] First, he relied on the characterization of the plaintiff's loss as that of "his natural capital equipment",[186] holding that "[t]he plaintiff has been deprived of his capacity to earn income [and it] is the value of that capital asset which has to be assessed".[187] Secondly, Judson J. argued that the defendant had no right to consider how the plaintiff would have spent his income, whether in paying

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[179] *Supra*, note 117.

[180] *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, note 94, and *Guy v. Trizec Equities Ltd.*, [1979] 2 S.C.R. 756, at 766, 99 D.L.R. (3d) 243.

[181] *Keizer v. Hanna*, *supra*, note 17.

[182] *Gehrmann v. Lavoie*, [1976] S.C.R. 561, 59 D.L.R. (3d) 634.

[183] See, generally, Cooper-Stephenson and Saunders, *supra*, note 2, at 426-27.

[184] *Supra*, note 15.

[185] For a lengthy discussion, see Cooper-Stephenson and Saunders, *supra*, note 2, at 185-95.

[186] *Supra*, note 117, at 545.

[187] *Ibid.*, at 546.

taxes or otherwise.[188] Finally, Judson J. noted the enormous complexities involved in attempting to estimate what the plaintiff's tax liabilities would have been as a reason for refusing to take them into account.

The English position, as we have indicated, rests on the assertion that an injured plaintiff cannot be said to have lost more than her after-tax income, which is the amount that would have been received had the wrong not been done.

In the considerable literature bearing upon this issue, the relative merits of the two positions have received close scrutiny. The English approach has been criticized on both pragmatic and conceptual grounds, as has the *Jennings* rule.

The practical objection to the *Gourley* rule is that it imposes upon courts the difficult task of assessing the amount of tax that the plaintiff likely would have paid on his income over his working life.[189] This requires the court to take into account any other possible income of the plaintiff, to speculate as to whether he would have made use of any of the tax planning devices available in order to decrease his tax liability, and to assess the probability that the tax rates will increase or decrease, or that the plaintiff might have moved to a jurisdiction with a higher or lower rate.[190] The problems of estimating future tax liabilities are even greater if the plaintiff's income was from operating a business.[191] Calculating the correct amount of the deduction for tax requires courts not only to speculate as to what might happen to the domestic tax system, but also to intepret and predict the

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[188] In this regard, he quoted with approval the following excerpt from the minority report of the Seventh Report of the Law Reform Committee (*ibid.*, at 545):

> What the plaintiff would have done or have been required to do with his money had he not suffered the injury complained of is, so far as the defendant is concerned, irrelevant. Tax is not a charge on income before it is received and there is no more reason for taking it into account than rates, mortgage interest and any other liabilities which the plaintiff may have to meet. To do so means that the defendant is making something less than full restitution for the injury. In other words, each £1 of income lost is worth £1 *to the plaintiff*, either to spend on himself, or to discharge his liabilities, including that for income tax.

See Seventh Report of the Law Reform Committee, *Effect of Tax Liability on Damages* (Cmnd. 501, 1958), at 4 (emphasis in the original).

[189] The other practical difficulty with the *Gourley* decision—the failure of the Court to take into account the fact that tax would be payable on the income generated by the damages award, which would lead to undercompensation—was recognized in *Taylor v. O'Connor*, *supra*, note 174.

[190] See Bale, "*British Transport Commission v. Gourley*, Reconsidered" (1966), 44 Can. B. Rev. 66, at 85-92, and Street, *Principles of the Law of Damages* (1962), at 88-104.

[191] Bale, *supra*, note 190, at 87-88.

future of foreign tax laws.[192] In response to these assertions, it has been argued that the degree of speculation required in the tax context is no greater than that already imposed on the courts in assessing the value of the plaintiff's lost earnings, and that mere difficulty of assessment has never been accepted as a reason for refusing to take a relevant factor into account.[193]

The conceptual attack on the English rule is that it is inconsistent with the characterization of the plaintiff's loss as a loss of the capacity to earn, which should be treated as a capital asset, the full value of which the plaintiff should receive. The income from the sum designed to replace the asset would then be subjected to tax just as the income from the use of the asset would have been taxed if the plaintiff had never been injured.[194] Indeed, this was the only reason adverted to by the Supreme Court of Canada in *Andrews*[195] when it affirmed its rejection of the *Gourley* approach.

Concerns of both practicality and principle are inherent in the objection to the *Jennings* rule as well. The *Jennings* approach has been criticized on the basis that the failure to take tax into account leads to overcompensation of injured plaintiffs.[196] It is argued that, since the plaintiff would not have had the benefit of her gross income, she is in a better position than prior to the injury, and thus will be able to enjoy a higher standard of living than could have been achieved through actually working, even though the future investment income is taxable.[197]

In fact, the question of overcompensation is a complex one. It has been shown that "[t]he extent of overcompensation under the *Jennings* approach depends crucially on the amount of earnings lost, the length of the working life, and the rate of inflation".[198] The degree of overcompensation thus varies and, indeed, there may even be undercompensation "at higher levels of lost earnings".[199]

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[192] *Ibid.*, at 79-80.

[193] See Cooper-Stephenson and Saunders, *supra*, note 2, at 191-92. See, also, McLachlin, "What Price Disability?" (1981), 59 Can. B. Rev. 280.

[194] See Waddams, *supra*, note 20, para. 417, at 242-43.

[195] *Supra*, note 94.

[196] See Cooper-Stephenson and Saunders, *supra*, note 2, at 195; Bale, *supra*, note 190, at 100; Gibson, "Repairing the Law of Damages" (1978), 8 Man. L.J. 637, at 654-55; and Rea, "Inflation, Taxation and Damage Assessment" (1980), 58 Can. B. Rev. 280.

[197] *Ibid.*, at 286-87.

[198] *Ibid.*, at 292.

[199] *Ibid.*, at 293.

Dissatisfaction with the approach to taxation has led some critics to propose an amendment to the *Income Tax Act*[200] to provide for taxation of the damages award in the hands of the plaintiff.[201]

The Commission has concluded that the existing rule should continue to govern the determination of damages for loss of working capacity in cases of non-fatal injury, and we so recommend. It is our view that the incidence of taxation is a concern extraneous to the assessment of damages as between plaintiff and defendant; it is a matter solely between the plaintiff and Revenue Canada. Should the impact of the *Income Tax Act* be regarded as overgenerous to plaintiffs, the legislation may be amended by Parliament.

We believe further that the defendant should pay compensation for the full amount of the loss that she has caused, regardless of whether the plaintiff subsequently may be obliged to account to Revenue Canada. In this case, what the plaintiff has lost—working capacity—is a loss of a capital nature that can be valued as a capital asset. It is analogous to a lost annuity, the compensation for which is the full capital value of the annuity, regardless of whether the income would have been taxable. Presumably, the plaintiff will invest the award in some way, and will pay income tax on the proceeds of the investment. If income tax were deducted in the initial calculation of the damages, the damages would have to be "grossed-up" in order to ensure that the plaintiff receives the proper income in view of the anticipated taxes on the investment income. Even though we shall make recommendations to address problems associated with gross-up under the present law,[202] not all of the difficulties would be removed.[203] The experience with gross-up in assessing future care has not been so favourable as to persuade us that it should be extended.[204]

As indicated, in relation to fatal accidents the Supreme Court of Canada has held that, in calculating damages, a deduction must be made in

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200 R.S.C. 1952, c. 148, as substantially re-enacted by S.C. 1970-71-72, c. 63.

201 See Krishna, "Taxation of Personal Injury Awards: A Wiry Methuselah" (1976-77), 3 Dalhousie L.J. 385, and Krishna, "Tax Factors in Personal Injury and Fatal Accident Cases: A Plea for Reform" (1978), 16 Osgoode Hall L.J. 723. See, also, Bale, *supra*, note 190, at 101, and Cooper-Stephenson and Saunders, *supra*, note 2, at 196.

202 See *infra*, ch. 4, sec. 3(d).

203 In some cases, gross-up would lead to large awards: see United Kingdom, Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (Cmnd. 7054, 1978) (hereinafter referred to as "Pearson Report"), Vol. I, para. 705, at 152.

204 See Waddams, *supra*, note 20, para. 417, at 242-43. If Revenue Canada were to change its policy and tax the award of damages for loss of working capacity, presumably appropriate allowance would have to be made for receipt within a single year of a sum of money representing loss over several years, and for the tax that would inevitably be paid by the plaintiff on the investment income. To avoid undercompensation, the award of damages either would have to be grossed-up or Revenue Canada would have to establish a tax-sheltered scheme for the damages, which would obviate the need for gross-up, along the lines that we recommend for the cost of future care: see *infra*, ch. 4, sec. 3(d)(i).

respect of the income tax that would have been payable by the deceased. Generally, academic commentators have criticized the different treatment of taxation in personal injury and fatal accident cases.[205] However, although commentators agree with respect to the desirability of consistency, they disagree about the approach to be favoured, with the *Gourley* approach[206] and the *Jennings* approach[207] each having its proponents.

For us, the answer to this issue lies in our fundamental recommendation that the deceased's loss of working capacity should be regarded as a loss of the estate—a recommendation that would assimilate the position of the estate of an injured person to that of the injured person herself. Accordingly, the assessment of damages should not vary according to whether the injured person dies just before, or just after, judgment is given. Moreover, if the compensation were calculated net of income tax, and no allowance, by means of gross-up, were made for the taxes to be paid by survivors from the proceeds of investment of the award, the survivors, in our view, would be undercompensated.

We therefore recommend that, where personal injury results in death, no deduction should be made from an award of damages for loss of working capacity in respect of the income tax that would have been payable by the deceased.[208]

(b) Cost of Earning

Where an injured person suffers a loss of earning capacity, the calculation of damages may include a deduction in respect of the expenses incurred by the plaintiff in earning income. Such a deduction is required where the plaintiff is no longer able to earn income, or must accept employment that does not involve these costs or involves lesser costs. As Cooper-Stephenson and Saunders point out, "[t]his can be seen as reflecting the plaintiff's reduced need for that portion of his earnings, or alternatively as reflecting an award of real earnings, in the sense that the plaintiff is entitled only to his net financial profit from employment".[209] On this analysis, loss of earnings is

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205 But see Waddams, *supra*, note 20, para. 420, at 245-46.

206 See Rea, *supra*, note 196.

207 See Sheppard, "The Tax Element in Compensation since *The Queen v. Jennings & Cronsberry*" (1971), 19 Can. Tax J. 448, at 450-51. See, also, Krishna, "Taxation of Personal Injury Awards: A Wiry Methusaleh", *supra*, note 201, for a critique that goes beyond the inconsistency of approach and suggests a legislative alternative to both *Gourley* and *Jennings*; and Cooper-Stephenson and Saunders, *supra*, note 2, at 195-96.

208 Draft Compensation Act, s. 6(1).

209 See Cooper-Stephenson and Saunders, *supra*, note 2, at 288. The authors refer to the statement by McGillivray J.A. (dissenting in part) in *Jennings v. Cronsberry and the Queen in Right of Ontario*, [1965] 2 O.R. 285, at 317, 50 D.L.R. (2d) 385 (C.A.), that "[i]t is customary when computing loss of income, to take into consideration the cost of earning such income and to deduct the same from the award".

analogized to loss of profits, insofar as gross earnings are not considered to represent the real loss to the plaintiff.[210]

In cases of non-fatal injury, the cost of earning income is deducted. Where life expectancy has been reduced, a deduction is made in respect of the cost of earning that would have been incurred during the so-called "lost years".

In determining claims under fatal accidents legislation, a deduction similarly must be made in respect of the deceased's cost of earning.[211] Cost of earning, like income tax, is deducted to reflect the fact that the dependants have lost only what the deceased would have actually had available to give them.

In the case of personal injury not leading to death, the law is sufficiently clear, and we recommend that no legislative statement of the principle be made. With respect to fatal accidents, we believe that our recommendation that legislation should provide expressly that a claim for loss of working capacity should survive to the estate of an injured person calls for general guidance as to the contours of that change. We therefore recommend that the draft *Personal Injuries Compensation Act* should provide expressly that, where personal injury results in death, the award of damages for loss of working capacity, other than damages for loss of capacity to give care and guidance, should be reduced by the cost of earning that would have been incurred by the deceased had death not resulted from the personal injury.[212]

(c) Personal Living Expenses

The deduction of personal living expenses has been the subject of judicial consideration in England, but not in Canada. In *Pickett v. British Rail Engineering Ltd.*,[213] the House of Lords held that, where the life expectancy of an injured person has been reduced, there should be a deduction of the living expenses that the plaintiff would probably have incurred during the "lost years".[214] In *Gammell v. Wilson*, which held that

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[210] See Cooper-Stephenson and Saunders, *supra*, note 2, at 289.

[211] *Ibid.*, at 428.

[212] Draft Compensation Act, s. 6(1).

[213] *Supra*, note 7.

[214] In *Pickett v. British Rail Engineering Ltd.*, *ibid.*, at 163, Lord Edmund-Davies said:

> [T]he court should make what it regards as a suitable deduction for the total sum which Mr. Pickett would have been likely to expend upon himself during the 'lost years'. This calculation, too, is by no means free from difficulty, but a similar task has to be performed regularly in cases brought under the Fatal Accidents Act. And in Scotland the court is required, in such cases as the present, to 'have regard to any diminution...by virtue of expenses which in the opinion of the court the pursuer...would reasonably have incurred...by way of living expenses....For, macabre though it be to say so, it does not seem right that, in respect of those years when

an action for loss of earning capacity survived in the case of immediate death, Lord Scarman stated that "[t]he loss to the estate is what the deceased would have been likely to have available to save, spend, or distribute after meeting the cost of his living at a standard which his job and career prospects at time of death would suggest he was reasonably likely to achieve".[215]

While the necessity of deducting personal living expenses in respect of the lost years is clear in England, and presumably is the law in Canada as well,[216] the precise meaning of the deduction is less certain. While endorsing the subtraction of "living expenses", the seminal decisions of the House of Lords do not explain the meaning of the phrase. This concept, however, was considered in *White v. London Transport Executive*.[217] The Court explained that, in respect of a deceased young man, it was necessary to deduct from prospective net earnings "the cost of maintaining himself"; this cost was said to include "the cost of his housing, heating, food, clothing, necessary travelling and insurances and things of that kind, if relevant".[218]

Calculation of the appropriate deduction is, in essence, a rough estimate. In *Gammell v. Wilson*, the House of Lords upheld an award of damages based on one-quarter of the net lost earnings of a young unmarried man. In *White v. London Transport Executive*, the Court allowed damages in the amount of one-third of the net lost earnings for the period during which the deceased would have been earning an income while living at home with his mother, and one-quarter for the period during which the deceased would have been living on his own, on the assumption that the deceased's expenses would have been less in the former case.[219]

Consistent with the approach that we have taken to deductions for the cost of earning, we believe that the deduction of personal living expenses should be expressly required where a claim for loss of working capacity survives to the estate of the deceased. In the case of a person leaving a spouse and children, the amount that would have been spent on personal living expenses would ordinarily be much less than if the person were unmarried and had no children; hence, a larger portion of the compensation for the lost working capacity would survive to the estate in the former case.

A further issue arises as to whether the determination of the deceased's personal living expenses should be left to the court, or whether fixed

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ex hypothesi the injured plaintiff's personal expenses will be nil, he should recover more than that which would have remained at his disposal after such expenses had been discharged.

[215] *Gammell v. Wilson*, *supra*, note 6, at 78.

[216] See Waddams, *supra*, note 20, para. 413, at 239.

[217] [1982] Q.B. 489, [1982] 2 W.L.R. 791 (subsequent references are to [1982] Q.B.).

[218] *Ibid.*, at 499. See, also, Waddams, *supra*, note 20, at 239.

[219] *Supra*, note 217, at 500-01.

amounts or percentages should be established by legislation. This question involves a dilemma familiar to the enterprise of law reform, and, indeed, inherent in the law of damages as a whole. If the quantification of living expenses is left entirely open, without any legislative guidance whatsoever, account can be taken of the individual characteristics of particular cases. However, an inevitable corollary of this approach, apart from the attendant uncertainty, is that in every case it will be necessary to present and test evidence with respect to the amount that the deceased probably would have spent on herself, had she lived. That such an inquiry will involve concomitant additional expense is obvious.

The advantages and disadvantages of fixing the personal living expenses as a proportion of income are the mirror image of leaving the matter entirely to the court. Flexibility will be sacrificed to secure certainty, as well as the saving of time and expense.

On balance, we favour the establishment of fixed percentages by legislation. Put simply, we regard the advantages of this approach, to both the parties and the court, as more weighty than the single disadvantage—the inability to respond to those cases where the conclusive percentages are inappropriate. We recommend that the personal living expenses that are to be deducted from the deceased's damages for loss of working capacity, other than damages for the loss of capacity to give care and guidance, should be conclusively presumed to be three-quarters of the projected income of a person who dies without a spouse or dependent children;[220] one-quarter of the projected income of a person who dies with a spouse but without any dependent children, during the anticipated joint life expectancy of the deceased and his spouse; and fifteen percent of the projected income of a person, with or without a spouse, who dies with dependent children, during the projected period of dependency.[221]

Earlier in this chapter,[222] we noted that an objection to channelling recovery through the estate is that there would be overcompensation where the deceased has no dependants. We explained that our proposals for deduction of personal living expenses would meet this reservation. Accordingly, it would be useful to compare the treatment of the death of a child under our recommendation to the position under the present law.

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[220] This is consistent with the position taken by the House of Lords in *Gammell v. Wilson*, *supra*, note 6.

[221] Draft Compensation Act, s. 6(2). In *Nielsen v. Kaufmann*, *supra*, note 39, at 198-99, the Ontario Court of Appeal held that in a two-income family, where there was a pooling of resources, the surviving spouse was entitled to 60% of the net income of the deceased spouse and each child was entitled to 4% of net income. In the case of a one-income family, this so-called "dependency rate" is 70% for a surviving spouse and 4% for each child.

[222] *Supra*, this ch., sec. 4(c).

Under our proposals, in the case of a child of five years who, if permanently disabled, would have been entitled to an award of $300,000,[223] the estate would recover about $75,000. If this seems to be an excessive sum, it must be compared with the current system, whereby the parents, grandparents, brothers, and sisters are all entitled to individually assessed awards for loss of guidance, care and companionship, as well as for any pecuniary loss that can be established. In some cases, these will exceed, in total, the figure mentioned. To the actual sums awarded must be added the costs of assessing the value of guidance, care and companionship—costs that, while not eliminated entirely under our scheme, would be reduced significantly. It is suggested that the increased cost to defendants of the proposed scheme in some cases will be offset by the gains in predictability and ease of assessment. In all cases, the total working capacity of the deceased, less the cost of earning and personal living expenses, will provide a firm maximum to the damages awardable.

8. DISTRIBUTION OF THE DAMAGES AWARD FOR LOSS OF WORKING CAPACITY

In this section, we shall discuss the distribution of an award of damages that is made in respect of loss of working capacity. We shall consider separately non-fatal injuries and fatal injuries, beginning with the former.

At present, in the case of a non-fatal injury, where an injured person, other than a person under a disability, is awarded damages, the disposition of the award is entirely within the discretion of that person, subject to the existence of the obligations of support established under Part III of the *Family Law Act, 1986*.[224] Where, however, the injured person is a person under a disability, such as a minor, an award of damages must be paid into court, unless the court orders otherwise.[225] Generally speaking, money may be paid out of court only in accordance with an order or report.[226]

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[223] The present value of lost earnings of a child of 5, based on average industrial wages in 1986 ($22,407), is $391,924. The assumptions on which this calculation is based are no loss of pension or fringe benefits, no cost of earning, male mortality, no productivity increases, and an earning span from ages 20-65. A contingency deduction of 25% would lead to approximately the figure given here of $300,000. Some recent cases have used much smaller figures: see, for example, $140,000 in *Scarff v. Wilson* (1986), 10 B.C.L.R. (2d) 273, 39 C.C.L.T. 20 (S.C.).

[224] *Family Law Act, 1986*, *supra*, note 15, s. 30 (obligation to spouse), s. 31 (obligation of parents to child), and s. 32 (obligation of non-minor child to parent).

[225] Rules of Civil Procedure, O. Reg. 560/84, r. 7.09. For the form of an order where payment is to be made on behalf of a minor, see, *ibid.*, r. 59.03(5).

[226] *Ibid.*, r. 73.03(1). Where money is in court to the credit of a person under a disability, an order for payment out may be obtained on motion to a judge by, or on notice to, the Official Guardian, except where the Public Trustee is committee of the person's estate, in which case the motion must be made by, or on notice to, the Public Trustee: *ibid.*, r. 73.03(10). It may also be paid out on consent in respect of money paid under an offer to settle or an acceptance of an offer or as security for costs: *ibid.*, r. 73.03(1) and (4).

We do not propose any changes with respect to the distribution of damage awards in the case of non-fatal injury, save, of course, for our recommendation to preclude third party claims by repealing Part V of the *Family Law Act, 1986*. This exception follows from our view that loss of earning capacity and loss of the capacity to give care and guidance are properly viewed as losses suffered by the injured party; family members suffer loss only to the extent that the victim would have chosen to devote the fruits of her labour to their benefit. Where an injured plaintiff recovers damages in respect of loss of working capacity, she should be free to determine whether, and how, it is to be distributed to others, subject only to the support obligations under the *Family Law Act, 1986*.

With respect to fatal accidents, we have taken an entirely different approach. Although we have recommended earlier that independent third party claims be abolished in favour of giving the right of action to the injured person or to her estate, as the case may be, we have not abandoned entirely the notion that the interests of certain third parties should be taken into account in the case of fatal accidents. We believe that the surviving spouse, dependent children, and dependent parents should continue to be entitled to receive a share of the damages recovered for loss of the deceased's working capacity.

Even in this limited context, we realize that retention of the notion that third parties should receive individual awards is a significant exception to the general theory of compensation that we have endorsed in this chapter, that is, that a loss should be considered to be that of the injured person or the estate. Theoretical consistency and purity, however, are not sacrosanct values. Occasionally, there are other values to which they must defer. In this case, it is our view that an exception to the general theory is warranted in order to avoid possible unexpected dispositions, according to the general law of succession, to persons other than those to whom the deceased would have devoted a portion of her productive capacity. That the law will thus continue to embody elements of two theories of compensation—one focusing on the loss of the injured person or her estate, the other on the needs of certain relatives of the victim—is not in itself objectionable, for this has long been a feature of the law in this area. Moreover, we emphasize that retention of a compensatory rationale in favour of certain family members in no way detracts from the major advantages that flow from our basic theory, in particular, the replacement of a number of independent actions, with their attendant transaction costs to the system and the parties, with a single action brought by an injured person or her estate.

Accordingly, in the case of fatal accidents, while damages for loss of working capacity would form part of the estate, we do not propose that the award should be subject to distribution under the general law governing succession or to the claims of creditors of the deceased. Rather, in order to accommodate the compensatory purpose that we have identified above, we shall propose below a scheme for the distribution of the damages awarded in respect of the deceased's loss among the surviving spouse, dependent children, and dependent parents.

As indicated, we are endorsing a limited exception to our general theory that, where an injury occurs, the loss is that of the victim, rather than that of a third person. If the deceased is not survived by any of the persons who, we believe, should enjoy a special claim to share in the damages, there is no reason to treat the award differently from that arising under any other cause of action that devolves upon a personal representative under section 38 of the *Trustee Act*.[227] We therefore recommend that, where there is no surviving spouse, dependent children or dependent parents, the damages in respect of loss of working capacity should be payable to the estate, and should be distributed like any other asset of the estate under the general law governing succession, and subject to the claims of creditors.[228]

We now turn, in the balance of this chapter, to our specific recommendations governing the apportionment of an award among a surviving spouse, dependent children, and dependent parents.

Once the court determines the amount of damages payable by the defendant in respect of lost working capacity, there is an issue as to how the award should be apportioned. We believe that a distinction must be drawn between that part of the damages awarded in respect of the deceased's loss of capacity to give care and guidance and the rest of the damages that are awarded for loss of working capacity. With respect to the former, it is our view that the persons in respect of whom the capacity to give care and guidance has been lost should be entitled to recover the amount of damages that have been attributed to that loss at trial. Since, by its very nature, this loss is assessed in relation to identified individuals, it would be inappropriate to propose otherwise. We therefore recommend that, where personal injury results in death, damages awarded for loss of capacity to give care and guidance should be distributed among the surviving spouse, dependent children, and dependent parents in the amounts assessed in respect of each of them.[229]

With respect to damages awarded for loss of working capacity, other than the damages awarded for loss of capacity to give care and guidance, the damages should be apportioned among the surviving spouse, dependent children, and dependent parents. The matter of apportionment should be decided by the court; since the appropriate apportionment will depend on the particular circumstances of individual cases, the matter should be left to the court without any express legislative direction.[230]

Should there be agreement among the surviving spouse, dependent children, and dependent parents with respect to the appropriate apportionment of the damages, the fact of unanimous agreement may be communi-

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[227] *Supra*, note 4.

[228] Draft Compensation Act, s. 9(b).

[229] *Ibid.*, s. 10.

[230] *Ibid.*, s. 11(1).

cated by counsel for the plaintiff, and the court may order apportionment in accordance with that consent. Where unanimous agreement cannot be attained, the surviving spouse, dependent children, and dependent parents may wish to make representations to the court, either through the plaintiff or independently. In some circumstances, however, the court may form the view that these representations are inadequate to allow it to decide apportionment, and that further evidence should be presented and tested. Accordingly, we recommend that, in determining apportionment of the damages awarded for loss of working capacity, other than for loss of capacity to give care and guidance, the court should be able to order the trial of an issue and to give such directions for that purpose as are considered just.[231]

A related procedural issue concerns the participation in the proceedings of the surviving spouse, dependent children, and dependent parents. None of these persons would be parties to the action, except in the cases where they also act as personal representative, or where, in accordance with a recommendation made below, they bring the action instead of the personal representative. Therefore, if they wish to participate in the proceedings and make representations to the court with respect to apportionment, or if the trial of an issue is ordered, it will be necessary for them to intervene as parties to the action. Rule 13.01 of the Rules of Civil Procedure governs intervention as an added party. Given the novel character of our proposed distribution scheme, it would be useful to clarify how these persons may become actively involved in the proceedings. Accordingly, we recommend that legislation should provide that the surviving spouse, dependent children and dependent parents may intervene as parties to the action under Rule 13 of the Rules of Civil Procedure.[232]

A further procedural issue relates to the possibility that one or more of the surviving spouse, dependent children, or dependent parents may be a person under a disability within the meaning of the Rules of Civil Procedure.[233] In such a case, special attention will have to be given to their interests. The court may form the view that, in order to apportion the damages award, more information is needed about their position than has been presented by the personal representative or, indeed, by a litigation guardian acting on their behalf, should there be intervention. Accordingly, we recommend that, where one or more of the surviving spouse, dependent children, and dependent parents entitled to apportionment is a person under a disability, the court should be able to order that notice be given to the Official Guardian or the Public Trustee or any other person whom the court considers appropriate.[234]

An important issue concerns whether the damages award should be exposed to the claims of the deceased's creditors or called upon to defray the

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[231] *Ibid.*, s. 11(4).

[232] *Ibid.*, s. 11(3).

[233] See Rules of Civil Procedure, *supra*, note 225, r. 1.03.10, which defines "disability".

[234] Draft Compensation Act, s. 11(2).

costs of administering the estate. Since the loss of working capacity is to be regarded as the loss of the injured person, in the case of a fatal accident it would be an asset of the estate and, as such, would be liable to the claims of creditors. In the absence of special protection, the surviving spouse, dependent children, and dependent parents might see their shares of the damages reduced or even consumed entirely by the creditors of the deceased. By contrast, third party claimants under Part V of the *Family Law Act, 1986* need not concern themselves with such creditors, as their causes of action arise entirely independently of the estate. An analogous problem is that, as part of the estate, the damages would be liable for the various expenses incurred in the administration of the general estate by the personal representative, including whatever legal costs are involved. To meet both these problems, we recommend that, where damages for loss of working capacity, including loss of the capacity to give care and guidance, are distributed by the court among the surviving spouse, dependent children, and dependent parents, the damages should not be subject to the claims of creditors of the deceased person or to the costs arising from the administration of the estate.[235]

Another important procedural issue relates to who should bring the action in respect of lost working capacity. It must be borne in mind that the loss is that of the deceased, and that the damages in respect of the loss will be treated like any other asset of the estate if the deceased is not survived by a spouse, dependent children, or dependent parents; consequently, the action, like any other claim for damages vested in a deceased, would ordinarily be brought by the deceased's personal representative. Where, however, the persons who are to receive damages in respect of loss of working capacity differ from the beneficiaries of the estate generally, it may be inappropriate to rely exclusively on the personal representative to bring the action. Where, for example, the deceased has made a will leaving the estate to persons other than the surviving spouse, dependent children, or dependent parents, an action for loss of working capacity, by definition, could bring no benefit either to the estate or to its beneficiaries.

Depending on the particular circumstances, the personal representative may judge the initiation of an action to be ill-advised, for it may be apparent that it can bring no financial advantage to the estate. If this is the case, unless there is some other means by which the action can be brought, the surviving spouse, dependent children, and dependent parents will not receive any damages at all for a reason totally extraneous to the merits of the claim or the justice of allowing them compensation. The sole way to overcome this potential difficulty is to confer a right to bring an action in respect of loss of working capacity on one of the surviving spouse, dependent children, or dependent parents, as was done under the former *Family Law Reform Act* and its predecessor, *The Fatal Accidents Act*.[236]

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[235] *Ibid.*, s. 9(a).

[236] *Family Law Reform Act*, R.S.O. 1980, c. 152, s. 61(2), and *The Fatal Accidents Act*, R.S.O. 1970, c. 164, s. 7(1).

We believe, however, that, before an action is brought by someone other than the personal representative, the latter should be permitted a reasonable period of time in which to assess the situation and to determine whether to commence an action. Under the former legislation,[237] a period of six months after the death of the deceased was allowed. This seems to be an appropriate interval. Where, however, a cause of action may be barred because of the impending expiration of a limitation period or a period for giving notice, a rigid requirement that six months elapse would work to the serious disadvantage of a surviving spouse, dependent children, or dependent parents. In order to avoid an injustice of this nature, the minimum six month period of time that must elapse before an action may be brought by a surviving spouse, dependent child, or dependent parent should be subject to an exception where leave of the court has been obtained.

Accordingly, we recommend that, as a general rule, an action for damages in respect of loss of working capacity should be brought by the personal representative on behalf of the estate.[238] Where, however, such an action has not been brought by the personal representative within six months of the death, we recommend that a surviving spouse, dependent child, or dependent parent should be able to bring the action that the personal representative could have brought. Finally, it is recommended that the surviving spouse, dependent child, and dependent parent should be entitled to bring the action before the lapse of the proposed six month period upon obtaining leave of the court.[239]

The matter of appeals warrants special treatment in light of the scheme for distribution that we have proposed. While we are of the view that the surviving spouse, dependent children, and dependent parents should have no right to appeal a judgment, insofar as it determines the fact and amount of the defendant's liability, except where the surviving spouse, dependent child, or dependent parent is also the plaintiff, the issue of allocation of the damages awarded stands on a very different footing. With respect to the issues of liability and the amount of damages, a surviving spouse, dependent child, or dependent parent is a stranger, whose interest is inchoate and indirect at best. However, once these issues have been determined and the question of allocation is to be decided, their interest in the proceedings becomes immediate and direct. At this juncture, the persons opposed in interest would be the others who might share in the damages award. Given the nature of their interest, we recommend that the surviving spouse, dependent children, and dependent parents should have a right of appeal from an order distributing or apportioning damages for loss of working capacity, notwithstanding that they are not parties or intervenors in the action.[240]

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[237] *Ibid.*

[238] Draft Compensation Act, s. 3(2).

[239] *Ibid.*, s. 13.

[240] *Ibid.*, s. 16(2).

A further issue concerns settlement of the main action. Even though the action, in theory, is that of the deceased or his estate, the surviving spouse, dependent children, and dependent parents will be the ultimate recipients of any damages awarded in respect of the loss of working capacity. In view of their interest in the action, the consent of all of them should be given before a settlement is effective. Accordingly, we recommend that legislation should provide that a settlement of a claim in respect of loss of working capacity requires the consent of the surviving spouse, dependent children and dependent parents whose existence is reasonably within the knowledge of the person making the claim.[241] In order to minimize the possibility of subsequent challenge to a settlement on the basis of failure of consent by a person claiming to be a spouse, dependent child or dependent parent, we believe that provision should be made for an application or motion to the court for a determination whether a particular individual is a person whose consent to a settlement is required. We so recommend.[242]

With respect to a settlement involving the interests of a person under a disability, we are of the view that the applicable policy should be that generally governing settlement of claims made by or against such a person. Rule 7.08 of the Rules of Civil Procedure provides that a settlement is not binding on the person without the approval of a judge. We believe that this requirement is entirely appropriate and that the procedure for obtaining approval of settlement, also set out in rule 7.08, should apply to claims by an estate in respect of lost working capacity. We therefore recommend that, where one or more of the surviving spouse, dependent children, and dependent parents is a person under a disability, the provisions of the Rules of Civil Procedure governing settlement of a claim made by or against a person under a disability should apply with necessary modification.[243]

The final issue relates to costs. In analyzing this issue, it is useful to distinguish between successful actions and unsuccessful actions. Turning to the former, where the action is brought as an action of the estate by the personal representative, the damages recovered are an estate asset, and the personal representative should be able to reimburse himself from them. Where the action has been brought by the surviving spouse, a dependent child, or a dependent parent, and, as a result, a fund of damages in which others may share has been recovered, on equitable, restitutionary principles, the person who has recovered such a fund should be able to obtain from that fund whatever costs are not reimbursed by an award of party and party costs against the defendant. The Commission is of the view that these principles ought to govern in the case of successful actions. We therefore recommend that costs incurred by the plaintiff in an action for damages for loss of working capacity that are not recovered from the defendant or

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[241] *Ibid.*, s. 8(1).

[242] *Ibid.*, s. 8(2).

[243] *Ibid.*, s. 8(3).

another party should be paid out of the damages on a *pro rata* basis before they are distributed.[244]

We now turn to consider unsuccessful actions. Where the action has been brought by a personal representative or by one of the surviving spouse, dependent children or dependent parents, that person will be primarily liable for the party and party costs of the defendant, and to pay her own lawyers. However, there will be no fund from which such costs may be paid. Nevertheless, for the reasons set out below, we see no need to deal with this matter by legislation.

Where the action has been brought by the personal representative for the benefit of the estate and the estate beneficiaries, reimbursement may be sought from the estate as in any other action brought on behalf of an estate. Of course, the surviving spouse, dependent children and dependent parents may differ from the beneficiaries of the estate, and in these circumstances reimbursement from the estate will not be possible. However, as a condition of commencing the action, the personal representative can always seek an agreement for indemnity from the persons among whom the damages will be apportioned. Similarly, where the action is brought by one of the surviving spouse, dependent children and dependent parents, rather than by the personal representative, that person also can seek an agreement for indemnity from fellow fund beneficiaries.

9. CLAIMS BY EMPLOYERS FOR LOSS OF SERVICES

The action *per quod servitium amisit* allows an employer to recover damages arising from injury to his employee caused by a tortfeasor.[245] The action traces its roots to medieval times, when a master could assert a proprietary interest in his servant, and was founded on the status relationship between a master and his servant.[246] It allowed the master to sue for a loss that was measured by the support that he was obligated to continue to provide to his servant, despite the servant's inability to work.

Employment is currently dictated by contractual and not status relationships. In Ontario, the *per quod* action is maintainable by any employer

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[244] *Ibid.*, s. 12.

[245] Fleming, *The Law of Torts* (6th ed., 1983), at 645.

[246] For discussion of the history of the action, see, generally, Hansen and Mullan, "Private Corporations In Canada: Principles of Recovery for the Tortious Disablement of Shareholder/Employees", in Klar (ed.), *Studies in Canadian Tort Law* (1977) 215; Jones, "*Per Quod Servitium Amisit*" (1958), 74 Law Q. Rev. 39; Irvine, "The Action Per Quod Servitium Amisit In Canada" (1980), 11 C.C.L.T. 241, at 242; Law Reform Commission of British Columbia, *Report on the Action Per Quod Servitium Amisit*, LRC 89 (1986) (hereinafter referred to as "B.C. Report"); and *Genereux v. Peterson Howell & Heather (Canada) Ltd.*, [1973] 2 O.R. 558, at 562-64, 34 D.L.R. (3d) 614 (C.A.) (subsequent references are to [1973] 2 O.R.).

whose employee has been tortiously injured.[247] The action is used to protect the employer's economic interest in the continued services of his employee. In *Genereux v. Peterson Howell & Heather (Canada) Ltd.*,[248] the Ontario Court of Appeal held that an employer may recover "the actual value of the services lost" and any out-of-pocket expenses incurred as a result of the injury to the employee.[249] The Court held that, "[s]ave in exceptional circumstances, the damages recoverable by the master are the same as those which in a proper case would be recovered by the servant".[250] In the usual case, then, the amount an employer paid in wages to his injured employee would represent "the actual value of the services lost". Medical expenses paid by the employer on the employee's behalf would also be recoverable in a *per quod* action.

In *Genereux*, however, the employer had, in fact, obtained the services of another person to take the place of the employee. The employer then sought to recover from the tortfeasor the amount paid to that person—an amount that exceeded the wages of the employee. The Court, in allowing the employer's claim for the full amount paid to secure equivalent services, viewed the circumstances of the case as "exceptional", because the employee had received wages not commensurate with the services rendered. In this case, therefore, an alternative method of computation for "the actual value of the services lost" was utilized. However, in Ontario at least, it has been clearly articulated that, as a general principle, the employer's economic loss and lost profits are beyond the limits of foreseeability and too remote to be included in the calculation of damages.[251]

In *The Queen v. Buchinsky*,[252] the leading Supreme Court of Canada authority, Dickson J., in a separate majority judgment, commented on the origins of the action and posed questions concerning its continued existence:[253]

> The *per quod* action developed during an era in which the master/servant relationship was analyzed in status terms, whereas we have long since treated

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247 In England, the action was limited to situations of loss of service of a *domestic* servant: *Inland Revenue Commissioners v. Hambrook*, [1956] 3 W.L.R. 643, [1956] 3 All E.R. 338 (C.A.). The action has been abolished by legislation: *Administration of Justice Act 1982*, *supra*, note 9, s. 2.

248 *Supra*, note 246.

249 *Ibid.*, at 571.

250 *Ibid.*, at 570.

251 *Ibid.*, at 571-72. See, also, *Racicot v. Saunders* (1979), 27 O.R. (2d) 15, 103 D.L.R. (3d) 567 (H.C.J.). In other jurisdictions, the extent and categorization of damages for loss of services is subject to controversy. For a discussion of the different approaches, see, generally, Hansen and Mullan, *supra*, note 246, at 225. For a summary of the cases that have allowed for recovery of lost profits, see Irvine, *supra*, note 246, at 247.

252 *The Queen v. Buchinsky*, [1983] 1 S.C.R. 481, 145 D.L.R. (3d) 1 (subsequent reference is to [1983] 1 S.C.R.).

253 *Ibid.*, at 490.

> the employment relationship as a contractual one. The debate is not whether the original assumptions underlying the action can any longer be supported. That rationale is plainly offensive in today's society. The serious question is whether, despite its antiquated origins, the action can now find a different justification. Does it serve a useful purpose that would not otherwise be met? Is it consistent with general principles of tort law concerning collateral benefits and recovery for economic loss? Do employers, simply because they are employers, merit a special cause of action? Should the action *per quod servitium amisit* be abandoned, maintained or expanded? In a future case it may be appropriate to address these issues.

The Commission agrees that, divorced from its historical proprietary rationale, the *per quod* action is archaic and anomalous.[254] Moreover, it violates the general rule that precludes a person from recovering economic loss that is consequent upon physical damage suffered by a third party. This rule, despite frequent challenges and the existence of a number of exceptions, is well established and is applied in all common law jurisdictions.[255] The justification usually advanced for the general exclusionary rule is that, in its absence, a single negligent act may culminate in an indeterminate number of causes of action.[256] If one accepts, as the courts generally have, that the rule is sound, the issue is whether an exception in favour of employers ought to be recognized on policy grounds.[257]

One possible justification for the continued existence of the *per quod* action is as a means of recovering lost business profits. It is difficult, however, to justify recognition of a special status for employers on this basis. The policy arguments suggest that employers are themselves best able to predict and absorb losses arising out of injury to employees.[258] In large

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254 *Genereux v. Peterson Howell & Heather (Canada) Ltd.*, *supra*, note 246, at 564, and England, The Law Commission, *Report on Personal Injury Litigation—Assessment of Damages*, Law Com. No. 56 (1973) (hereinafter referred to as "Law Commission Report"), para. 142, at 39.

255 The seminal decisions are *Cattle v. The Stockton Waterworks Co.* (1875), L.R. 10 Q.B. 453; *Simpson v. Thomson* (1877), 3 App. Cas. 279 (H.L.); and *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). See, generally, Feldthusen, *Economic Negligence* (1984), ch. 5. See, also, *Leigh and Sillivan Ltd. v. Aliakmon Shipping Co. Ltd.*, [1985] Q.B. 350, [1985] 2 W.L.R. 289 (C.A.), aff'd [1986] A.C. 785, [1986] 2 W.L.R. 902 (H.L.), where the general rule was reaffirmed and a previously recognized exception overruled.

256 See, for example, Fleming, *supra*, note 245, at 136.

257 *Ibid.*, at 646, and Hansen and Mullan, *supra*, note 246, at 244. It should be noted that, from an historical perspective, the *per quod* action, being, in effect, the master's claim for damage to property, is not an exception. It is only when that rationale is rejected that it stands as an exception.

258 England, The Law Commission, *The Actions for Loss of Services, Loss of Consortium, Seduction and Enticement*, Working Paper No. 19 (1968), para. 9, at 11-12. See, also, Hansen and Mullan, *supra*, note 246, at 245-46.

enterprises, employee absence from many causes is entirely predictable and therefore incorporated into management planning. "Key-man" insurance is available to compensate for the lost services of an indispensable employee. It seems impractical to substitute for such existing schemes a *per quod* action in the case of tortious injuries to the employee, or to protect employers who do not find it worthwhile to protect themselves otherwise.

Another justification advanced in favour of retention of the *per quod* action is that the possibility of reimbursement creates an incentive for employers to provide medical care, disability pay or pensions to injured employees.[259] The Commission is of the view, however, that this rationale provides an insufficient basis for retention of the action. While such an incentive may have been important in an earlier social and economic context, there are today other means of ensuring the provision of injury benefits to employees. Apart from the existence of private insurance, and public programs such as the Ontario Hospital Insurance Plan providing for comprehensive medical coverage, the matter of reimbursement in respect of benefits provided by an employer to an injured employee may be the subject of agreement between the parties. For example, terms may be incorporated into the employee's contract of service to provide for indemnification of the employer in the event that the employee recovers damages from the tortfeasor.[260] Alternatively, the contract may provide that disability benefits provided by the employer are in the form of a loan that is subject to repayment.[261] It should also be noted that recommendations relating to collateral benefits made in chapter 6 of this Report would facilitate recovery by an employer, directly from the wrongdoer, of the amount of any benefit in the nature of an indemnity paid to an injured employee.[262]

In conclusion, the historical justification for the action *per quod servitium amisit* is irrelevant and repugnant in the twentieth century. Moreover, there is no compelling justification for an exception, in the case of employers, to the rule against recovery of economic loss consequent upon physical damage suffered by a third party. Private agreements between employers and employees, as well as insurance, can fulfil the original functions of the *per quod* action. Throughout this chapter we have taken the position that the injured person, rather than third parties, should recover damages in respect of lost working capacity. Consistent with this position, we recommend that the action *per quod servitium amisit* should be abolished by legislation.[263]

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[259] *Ibid.*, at 244-45, and Fleming, *supra*, note 245, at 646.

[260] B.C. Report, *supra*, note 246, at 18, and Irvine, *supra*, note 246, at 295.

[261] Law Commission Report, *supra*, note 254, paras. 146-48, at 40-41.

[262] See *infra*, ch. 6, sec. 4, and draft Compensation Act, s. 14.

[263] *Ibid.*, s. 2.

10. STATEMENT OF DISSENT AND EXPLANATION BY MARGARET A. ROSS

The current law, Part V of the *Family Law Act, 1986* ("FLA"), permits claims by third parties (the "FLA Class") as listed in s. 61(1) for the loss of that portion of future earnings of the tort victim that would have benefited them. The same third parties are also permitted to claim for loss of care, guidance and companionship that the claimant might reasonably have expected to receive from the tort victim if injury or death had not occurred. The loss of ability to earn income or loss of earning capacity of the victim is treated separately from those claims of third parties.

As is fully canvassed in the text (this ch., sec. 3), there exist two theories of compensation: (1) that the loss is that of the injured person or, in case of death, the estate; and (2) that third parties should have independent rights in their own names.

It is recognized that problems exist under the current law which allows claims by third parties in cases of personal injury and death. These problems may be briefly summarized as follows:

(1) The double recovery concern. (The potential overlap between claims by an injured person or the estate for loss of earning capacity and claims by third parties for their pecuniary loss under Part V of the FLA.)

(2) The inquiry into the relationship problem and the attendant costs. (Since the cause of action for damages for loss of monetary contribution under the FLA is relational and involves distasteful speculation as to dependency, length of marriage, etc.)

(3) The difficulty of distinguishing compensable losses. (Care, guidance and companionship from grief, which is not, in theory, compensable.)

(4) The concern about nuisance claims. (The FLA Class and its ability to claim in fatal and non-fatal cases has led to many trivial claims, added considerably to the complexity of actions and impeded settlement.)

(5) The possibility of multiple actions. (Under the FLA each statutory claimant may commence its own action—which must be investigated, evaluated and defended.)

(6) Unpredictability and inconsistency in awards.

The Commission's recommendations for reform endorse the theory that the loss is that of the injured person or, in the case of death, the estate.

Accordingly, the third party claims for loss of monetary contributions and care, guidance and companionship would be abolished and would be replaced by a first party claim for loss of earning capacity and loss of the capacity to provide care and guidance, which would survive death. There would be no claim for loss of capacity to provide companionship. Therefore, a claim would be advanced by the victim (or the representative of the estate) which would include damages for loss of "working capacity", the aggregate of loss of ability to earn income and loss of capacity to provide care and guidance. The FLA Class in respect of whom the loss of ability to provide care and guidance may be claimed, would be restricted (the "restricted class") to spouses (as defined in the FLA, Part III), dependent children and dependent parents. Siblings, grandparents and grandchildren are excluded.

I share my colleagues' view that there are problems which exist as a result of the current system. I would support, in addressing the problems of nuisance claims and multiple actions, the restriction of the FLA Class to those family members most likely to be directly affected by the injury or death of a loved one.

However, I am not persuaded that embracing the theory of loss to the victim and the procedural recommendations which flow from the loss of working capacity claim advances the cause of reform or achieves any real progress in solving the existing problems. In addition, the scheme proposed by my colleagues would create, in its application, numerous problems (discussed below), which, in my opinion, outweigh any perceived advantage or improvement.

In theory, the notion that any loss should be perceived as a loss to the victim is not objectionable. I do not agree that it has any more validity than the theory that certain family members experience a real loss, albeit in some cases non-pecuniary in nature, in the form of the deprivation of an advantage upon the injury or death of a relative, for which an award of damages is justified. Given the problems which I believe are created by the application of the proposed scheme, I cannot support my colleagues in their adherence to the loss of the victim theory.

It is convenient here to digress momentarily with respect to the recommendation to delete the companionship component of the care, guidance and companionship claim. The rationale for this decision as set forth in chapter 2 appears to be that loss of companionship, more so than loss of guidance and care, is suggestive of non-pecuniary loss, or grief. The proposal to delete companionship is further based on the perception that the cost of compensating for such loss is unwarranted. The case law does not provide adequate support for the rationale and the decision to exclude companionship. Companionship cannot, in my view, be isolated as the culprit responsible for awards that look like solace. Put differently, the cases do not seem to rely on the word "companionship" as opposed to "guidance" and "care" in making awards that may be seen as solace or that may respond to seemingly

non-pecuniary loss. I am not persuaded that anything is gained by distinguishing the meaning of the word "companionship" from the meaning of the words "guidance" and "care".

The Commission's recommendations include a proposal to restrict the class of persons in respect of whom loss of the ability to provide care and guidance may be claimed to spouses, dependent children and dependent parents. The proposal's objective is to diminish the need to investigate the nature of the relationship between the provider and the recipient of care and guidance and to reduce or eliminate nuisance claims. While, as earlier stated, I support the notion of the restricted class, in my view there will continue to be a need for an inquiry into the nature of the relationship between the injured or deceased and the person to whom care and guidance was provided. Thus, one of the principal reasons for adopting the recommendation is not valid. In addition, it will still be necessary to continue to prove and defend a claim for the provision of care and guidance. Therefore, on the one hand the proposed change would produce little advantage and on the other hand would produce several disadvantages.

Although the proposed system would eliminate multiple proceedings in the sense that there would only be one action, the problems created in the proposed assessment, notice, apportionment and distribution procedures are far more cumbersome than the existing system which permits separate claims but where, in practice, the norm is one action.

A further problem with the proposed scheme is that fatal and non-fatal claims are treated differently. In non-fatal cases, it is anticipated that the injured person would prove a loss of capacity to provide care and guidance (by inquiry into the nature of the relationship with the restricted class) and then receive the damage award directly, being free to retain it or pay it over if desired. In fatal cases, the damages would not go to the estate (except where there are no members of the restricted class) but to a fund which is then distributed to the members of the restricted class in accordance with the proportions allocated by the trial Judge. This is done in order that the restricted class benefit regardless of whether they would take under ordinary succession law and in order that the fund avoid the claims of creditors. The result is that the recipient of the damage award is entirely different depending on whether one is dealing with a fatal or non-fatal case. Moreover the right of the restricted class to receive a benefit is only recognized in fatal cases.

There is a difficulty with the recommended distribution scheme which, in my view, represents an additional theoretical inconsistency. Damages for loss of working capacity in fatal cases, other than the damages awarded for loss of capacity to give care and guidance, would be apportioned by the Court and payable to members of the restricted class rather than becoming an asset of the estate. Moreover, this aspect of the Commission's scheme is dependent on unanimous agreement between plaintiff's counsel and

members of the restricted class. If such unanimous agreement cannot be achieved, the members of the class may make representations to the Court concerning apportionment, which may result in the trial of an issue and, hence, more litigation. The trial of this issue would proceed in the absence of the defendant since presumably once the claim for lost working capacity has been assessed his interest ceases. In addition, since none of the members of the restricted class would be parties to the action, except in the situation where they act also as a personal representative or bring the action in lieu of the personal representative, they must intervene as third parties pursuant to Rule 13.01. As earlier stated, without assurances that unanimous agreement will be achieved in the majority of cases, this situation cannot be seen as an improvement to the existing law.

Another procedural difficulty relates to who should bring the action in respect of loss of working capacity. Under the Commission's proposals, the action, like any other claim for damages, would ordinarily be brought by the deceased's personal representative. However, in cases where the persons who are to receive damages in respect of loss of working capacity differ from the beneficiaries of the estate, it may be inappropriate to rely on the personal representative to bring the action as the bringing of such action would not necessarily be to the advantage of those persons whom he represents.

The Commission, having foreseen this problem, recommended that a member of the restricted class should be able to bring the action that the personal representative could have brought. The result is two separate actions that will proceed simultaneously—one by the personal representative for damage suffered by the estate (for example, for past pecuniary loss) and one by a member of the restricted class for loss of working capacity alone. The potential, therefore, exists for multiple actions based on the same facts, with the same defendant, and the same issues as to liability. Presumably, these actions will eventually be tried together, but the goal of simplicity and reduced cost is again defeated.

One further important issue which argues against the Commission's proposal is that, for settlement purposes, the consent of each member of the restricted class would be required before a settlement is effective. It would be incumbent on the personal representative to obtain the consent of each member of the restricted class. In the event there were any disputes as to the issue of dependency or the definition of spouse, this would require an application or motion to the Court for settlement purposes. This impediment to settlement and its attendant cost is a further argument against the proposed reform.

In conclusion, it is my view that, taken together, the difficulties mentioned above outweigh any advantages of the proposed scheme. Where the choices involve (as some writers have advocated) total elimination of compensation for loss of guidance, care and companionship, or the Commission's proposed recommendations, or retention of the existing system, I

would recommend the retention of the latter with the modification of a restricted class. Restriction of the class would have the advantage of avoiding some of the so-called nuisance claims and reducing the number of claimants, thus keeping costs limited to those "real claims". With respect to claims for loss of working capacity, I would support my colleagues' recommendations regarding income tax treatment and deduction of cost of earnings.

Retention of the existing system, as earlier recognized, still perpetuates certain difficulties but there are possible approaches to reform of this system which may be an improvement. Firstly, if one accepts that our law does not allow recovery for grief, perhaps both "guidance" and "companionship" could be deleted and recovery allowed only for "care" insofar as this has a pecuniary aspect. Secondly, as already mentioned, these claims should be limited to a narrower class of claimant as defined by the Commission's recommendation.

The scheme proposed by my fellow Commissioners does not, in my view, improve the existing system. In fact, it perpetuates many of the problems already recognized under that system and creates other problems which potentially have the effect of protracting the litigation and adding to the cost in pursuit of a loss to the victim theory.

RECOMMENDATIONS

The Commission makes the following recommendations:*

1. (1) Third party claims under Part V of the *Family Law Act, 1986* for pecuniary losses and for loss of guidance, care and companionship resulting from wrongful injury to or death of another person should be abolished and replaced by a first party claim for loss of "working capacity", as defined in Recommendation 3, *infra*.

   (2) Accordingly, section 61(1) and section 61(2)(e) of the *Family Law Act, 1986* should be repealed. (See, further, *infra*, ch. 4, Recommendation 8, concerning repeal of the remainder of section 61.)

2. Legislation should provide clearly that a claim for loss of working capacity survives to the estate of a deceased tort victim.

3. Loss of working capacity should be defined to mean loss of productive capacity including,

   (a) loss of the capacity to earn;

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* One of the Commissioners, Mrs. Margaret A. Ross, dissents from most aspects of the scheme embodied in the following recommendations: see *supra*, this ch., sec. 10.

(b) loss of the capacity to provide care and guidance to a spouse, dependent children or dependent parents of the injured or deceased person as defined in Recommendation 4, *infra*;

(c) loss of the capacity to provide household services; and

(d) loss of entitlement under a pension, annuity or similar instrument.

4. For the purposes of Recommendation 3(b), *supra*,

(a) "spouse" should be defined to mean a spouse within the meaning of Part III of the *Family Law Act, 1986*;

(b) "dependent child" should be defined to mean a child who is a minor, or a child who is not a minor but who has, or who immediately before the death had, a reasonable expectation of receiving substantial pecuniary benefit from the injured or deceased tort victim; and

(c) "dependent parent" should be defined to mean a parent who has, or who immediately before the death had, a reasonable expectation of receiving substantial pecuniary benefit from the injured or deceased tort victim.

5. For the purposes of Recommendation 3(c), *supra*, compensation for loss of capacity to perform household services should be assessed with reference to the average weekly earnings in Ontario (industrial aggregate).

6. In cases of non-fatal injury, the existing rule, that income tax should not be deducted from the award, should continue to govern the determination of damages for loss of working capacity.

7. Where personal injury results in death, no deduction should be made from an award of damages for loss of working capacity in respect of the income tax that would have been payable by the deceased.

8. Where personal injury results in death, the award of damages for loss of working capacity, other than damages for loss of capacity to give care and guidance, should be reduced by the cost of earning that would have been incurred by the deceased but for the personal injury.

9. (1) Where personal injury results in death, the award of damages for loss of working capacity, other than damages for loss of capacity to give care and guidance, should be reduced by the amount of the deceased's personal living expenses as determined under paragraph (2).

(2) The personal living expenses that are to be deducted from the

damages award should be conclusively presumed to be three-quarters of the projected income of a person who dies without a spouse or dependent children; one-quarter of the projected income of a person who dies with a spouse but without any dependent children, during the anticipated joint life expectancy of the deceased and his spouse; and fifteen percent of the projected income of a person, with or without a spouse, who dies with dependent children, during the projected period of dependency.

10. Where there is no surviving spouse, dependent children or dependent parents, the damages in respect of loss of working capacity should be payable to the estate, and should be distributed like any other asset of the estate under the general law governing succession, and subject to the claims of creditors.

11. Where damages are assessed in respect of the loss of capacity to give care and guidance, the damages should be distributed among the surviving spouse, dependent children, and dependent parents in the amounts assessed in respect of each of them.

12. Damages awarded for loss of working capacity, other than the damages awarded for loss of capacity to give care and guidance, should be apportioned among the surviving spouse, dependent children and dependent parents. The matter of apportionment should be decided by the court.

13. In determining apportionment of the damages awarded for loss of working capacity, other than for loss of capacity to give care and guidance, the court should be able to order the trial of an issue and to give such directions for that purpose as are considered just.

14. Legislation should provide that the surviving spouse, dependent children and dependent parents may intervene in respect of the issue of apportionment as parties to the action under the Rules of Civil Procedure.

15. Where one or more of the surviving spouse, dependent children, and dependent parents is a person under a disability, the court should be able to order that notice be given to the Official Guardian or the Public Trustee or any other person whom the court considers appropriate.

16. Where damages for loss of working capacity, including loss of the capacity to give care and guidance, are distributed by the court among the surviving spouse, dependent children, and dependent parents, the damages should not be subject to the claims of creditors of the deceased person or to the costs arising from the administration of the estate.

17. (1) Subject to paragraph (2), an action for damages in respect of loss of working capacity should be brought by the personal representative on behalf of the estate.

(2) A surviving spouse, dependent child or dependent parent should be able to bring the action that the personal representative could have brought where an action has not been brought by the personal representative within six months of the death, or sooner with leave of the court.

18. The surviving spouse, dependent children, and dependent parents should have a right of appeal from an order distributing or apportioning damages for loss of working capacity, regardless of whether they are parties or intervenors in the action.

19. (1) Legislation should provide that, where personal injury results in death, a settlement of a claim in respect of loss of working capacity requires the consent of the surviving spouse, dependent children and dependent parents whose existence is reasonably within the knowledge of the person making the claim.

(2) Legislation should provide that an application or motion may be made to the court to determine whether any person is a spouse, dependent child or dependent parent whose consent is required under paragraph (1).

(3) Where one or more of the surviving spouse, dependent children, and dependent parents is a person under a disability, the provisions of the Rules of Civil Procedure governing settlement of a claim made by or against a person under a disability should apply with necessary modification.

20. Costs incurred by the plaintiff in an action for damages for loss of working capacity that are not recovered from the defendant or another party should be paid out of the damages on a *pro rata* basis before they are distributed.

21. The action *per quod servitium amisit* should be abolished.

CHAPTER 3

DAMAGES FOR NON-PECUNIARY LOSS

1. INTRODUCTION

In this chapter, the Commission will consider the nature and role of compensation for non-pecuniary loss suffered by an injured person. Although the view of what constitutes non-pecuniary loss has changed somewhat over the years,[1] the modern tendency is to describe such loss as involving three distinct elements: pain and suffering; loss of amenities (sometimes called loss of enjoyment of life); and loss of (or shortened) expectation of life.

It is obvious that not all forms of non-pecuniary loss are necessarily present in every personal injury case. Where two or more are present, however, the Supreme Court of Canada, in a series of cases commonly referred to as the "trilogy",[2] has held that it is proper and necessary to assess a single global sum to cover all non-pecuniary loss. As we shall see, this view reflects the essential similarity of purpose, as well as the basic imprecision, at least in monetary terms, of the three heads of damage.

Until recently, damages for pain and suffering, including mental distress, could be recovered only by a plaintiff who had also suffered a personal injury as a result of negligence or a nominate intentional tort. Mental distress alone could not form the basis for a separate award or an independent action. Emotional distress sufficiently serious to cause "objective and substantially harmful physical or psychopathological consequences"[3] can now provide the basis for a separate claim, although in such circumstances it is possible to label the harm a "personal injury" and it is likely that the plaintiff will have suffered pecuniary loss as well. However, the law in this

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[1] The concepts of pecuniary and non-pecuniary loss did not, in fact, appear until the 19th century, by which time there was a distinct law of torts. See Cherniak and Sanderson, "Tort Compensation—Personal Injury and Death Damages", in Law Society of Upper Canada, *Special Lectures of the Law Society of Upper Canada 1981[:] New Developments in the Law of Remedies* (1981) 197, at 202.

[2] *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452 (subsequent references are to [1978] 2 S.C.R.); *Arnold v. Teno*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609; and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480 (subsequent reference is to [1978] 2 S.C.R.).

[3] Fleming, *The Law of Torts* (6th ed., 1983), at 146.

area is evolving at a relatively rapid pace. The English Court of Appeal, for example, has allowed damages for emotional distress in breach of contract cases,[4] and Ontario courts seem prepared to follow suit.[5]

In Ontario, there may also be an award of damages for non-pecuniary loss arising from the interference with relational interests where such loss flows from the injury or death of an individual. This type of award is provided for in section 61(2)(e) of the *Family Law Act, 1986*,[6] which states that the damages recoverable include "an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred". While it was at one time asserted that damage of this kind was pecuniary in nature, it now appears to be generally accepted that such a classification was something of a fiction. Those entitled to make a claim under the Act are the spouse, children, grandchildren, parents, grandparents, brothers, and sisters of the person injured or killed. Other jurisdictions have statutes that limit recovery to cases of wrongful death and include a less extensive family group, omitting brothers and sisters. Most also limit recovery to pecuniary loss.[7]

In our examination of damages for non-pecuniary loss, the Commission will consider whether such damages should continue to be awarded to a living plaintiff and, if so, whether there should be any change in the law—more particularly, the $100,000 limit—set forth by the Supreme Court of Canada in the trilogy, that is, *Andrews v. Grand & Toy Alberta Ltd.*,[8] *Arnold v. Teno*,[9] and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*.[10] Given our endorsement of awards of damages for non-pecuniary loss, we shall examine several further matters that arise in connection with such awards. The first matter concerns whether, and, if so, the degree to which, guidance should be given by the trial judge to the jury in respect of the quantum of damages awardable, and whether counsel should be entitled to speak to this issue. In this context, we shall also consider the review of jury and court awards by appellate courts.

The second matter arising in connection with awards for non-pecuniary loss concerns the survival of actions in favour of the estate of a deceased

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[4] *Jarvis v. Swans Tours Ltd.*, [1973] Q.B. 233, [1972] 3 W.L.R. 954 (C.A.), and *Heywood v. Wellers*, [1976] Q.B. 446, [1976] 2 W.L.R. 101 (C.A.).

[5] *Pilon v. Peugeot Canada Ltd.* (1980), 29 O.R. (2d) 711, 114 D.L.R. (3d) 378 (H.C.J.). See, also, *Brown v. Waterloo Regional Board of Police Commissioners* (1983), 43 O.R. (3d) 113, 150 D.L.R. (3d) 729 (C.A.).

[6] S.O. 1986, c. 4.

[7] For a discussion of third party claims, including claims for loss of guidance, care, and companionship, under the *Family Law Act, 1986*, see *supra*, ch. 2.

[8] *Supra*, note 2.

[9] *Supra*, note 2.

[10] *Supra*, note 2.

injury victim. The Commission will discuss whether there should be any change in the law that now permits the estate to recover damages in respect of the deceased's pain and suffering and, apparently, loss of amenities, although not loss of expectation of life.

The final related matter pertains to damages for emotional distress. The Commission will consider whether damages for such distress, standing alone, should be recoverable, and, if so, whether the right to recover them should be enshrined in legislation.

2. THE NOTION OF NON-PECUNIARY LOSS

The essential idea of a pecuniary loss is relatively straightforward. An injury or death may generate a variety of expenses and reduce or eliminate a number of opportunities and expectations having a clear pecuniary component. While the calculation of the dollar value of these losses may not always be simple to perform—because, in the case of permanent injury or death, the lump sum damage award involves predictions or educated guesses as to the future—it is not difficult to think of these as losses.

The notion of a non-pecuniary loss is more difficult. Certainly there is a sense of loss experienced by someone who, because of some physical impairment, can no longer enjoy life to the same extent as before the injury, or who suffers continuing discomfort or disability, or who now has a shorter lifespan. And while there may be no physical pain, emotional distress, or frustration experienced by an unconscious victim, there is still the loss of the ability to enjoy life, as well as, in many cases, the loss of expectation of life. But, whereas an objective pecuniary value can be determined, or at least approximated, where a person, for example, requires medical care or can no longer earn income because of a disability,[11] one cannot, except arbitrarily, attach a dollar value to non-pecuniary loss. Thus, we are here considering a "loss" of a different order.

It is not, of course, essential, in order to justify an award of damages or to decide on the appropriate amount of compensation, to continue to refer to these conditions as losses. One may well choose other labels. But the issues canvassed in this chapter clearly transcend the matter of characterization. Rather, they deal with the central questions of policy respecting awards of damages for non-pecuniary loss—for example, whether they should continue to play a role in a future compensation regime and, if so, the principles on which they should be calculated. In order to be able to make these determinations, it is necessary first to consider the purpose of such awards.

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[11] But see United Kingdom, Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (Cmnd. 7054, 1978) (hereinafter referred to as "Pearson Report"), Vol. 1, para. 360, at 85, where it is said that "[a]lthough in theory all expenses resulting from injury are recoverable as pecuniary loss, in practice some of them may well be unquantifiable...".

3. THE PURPOSE OF DAMAGES FOR NON-PECUNIARY LOSS

(a) Introduction

Before examining briefly the three heads of damage for non-pecuniary loss, a general comment relating to awards of damages for such loss ought to be made. The Supreme Court of Canada's approval in the trilogy of a global award for non-pecuniary loss involved a recognition of the essential similarity of purpose of the three heads of damage and that a separate assessment would suggest a capacity for precision that would simply be misleading. In *Andrews v. Grand & Toy Alberta Ltd.*, Mr. Justice Dickson, delivering the reasons for judgment of the unanimous Court, asserted:[12]

> It is customary to set only one figure for all non-pecuniary loss, including such factors as pain and suffering, loss of amenities, and loss of expectation of life. This is a sound practice. Although these elements are analytically distinct, they overlap and merge at the edges and in practice. To suffer pain is surely to lose an amenity of a happy life at that time. To lose years of one's expectation of life is to lose all amenities for the lost period, and to cause mental pain and suffering in the contemplation of this prospect. These problems, as well as the fact that these losses have the common trait of irreplaceability, favour a composite award for all non-pecuniary losses.

(b) Pain and Suffering

The use of the two words "pain" and "suffering" usually denotes two conditions: physical discomfort and mental or emotional distress. As in the case of the other heads of non-pecuniary loss, an award of damages under this head can be expected to do nothing more than to provide solace. It cannot function in the fashion of an analgesic to deaden the pain or as a tranquillizer to lighten the distress. It cannot replace the physical comfort or emotional tranquillity that may be considered to have been "lost". But it may have an important consoling effect nonetheless, in that it signifies a recognition by the law of the unhappy consequences that a personal injury has brought upon its victim. An award may also help to alleviate some pain and suffering or distract the injured party by permitting him to purchase material or other comforts that he may otherwise lack.

Few seem to question the propriety of an award for this purpose,[13] although it seems to be agreed that, if the injury victim is unconscious and, therefore, unaware of his condition, there should be no award for pain or suffering.[14] It has also been suggested "that giving damages for physical pain

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[12] *Supra*, note 2, at 264.

[13] Although, as will be noted *infra*, this ch., sec. 6, some no-fault proposals would omit all non-pecuniary heads of compensation.

[14] No such damages were awarded in *The Queen in right of Ontario v. Jennings*, [1966] S.C.R. 532, 57 D.L.R. (2d) 644. See, also, *Lim v. Camden and Islington Area Health*

that is wholly past, not continuing and not expected to recur, is simply an anomaly, for there can be no solace for past pain".[15] But unlike the unconscious injury victim, the victim whose pain is a thing of the past is nevertheless aware of having had that experience; arguably, therefore, it is still possible for the law to signify to the injury victim, by an award of damages, its recognition of the fact that he has had an unpleasant experience, the memory of which may well continue.[16]

Where pain and suffering are permanent or long term, it is normally because the injury is disabling to some degree. Thus, there is also likely to be a loss of amenities, that is, a loss of the capacity to do certain things or to enjoy doing them. There may not necessarily be a shortened expectation of life. However, as we have noted, the Supreme Court has established that a global sum should be assessed, thereby recognizing, among other things, the similarity of the three heads.[17]

(c) Loss of Amenities and Shortened Expectation of Life

The independent claim for loss of expectation of life was first explicitly recognized by the courts in *Rose v. Ford*.[18] The loss was seen as something in the nature of a loss of a property interest. As Lord Wright stated:[19]

> [A] man has a legal right that his life should not be shortened by the tortious act of another. His normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given.

Authority, [1980] A.C. 174, [1979] 3 W.L.R. 44 (H.L.) (subsequent reference is to [1980] A.C.), and Pearson Report, *supra*, note 11, para. 394, at 91. Concerning the distinction between pain and suffering, on the one hand, and the other two heads of damage, on the other, with respect to the question whether an award should be made to an unconscious plaintiff, see text accompanying notes 22-25, 35-36, and 101-04, *infra*.

[15] *Skelton v. Collins* (1966), 39 A.L.J.R. 480 (H.C.), at 496, *per* Windeyer J.

[16] For pain that is past, damage awards tend to be moderate, although in minor injury cases—which represent the majority of cases—pain and suffering is often the biggest single head of damages. An examination of Stonehouse *et al.* (eds.), *Goldsmith's Damages for Personal Injury and Death in Canada* (Digest Service) discloses that, for minor injuries, non-pecuniary damages can go as high as $10,000, but that the usual range is from $500 to $3,500. A not untypical case described injuries that required no treatment other than ice packs and analgesics, cleared up completely and brought an award of $1,500 in non-pecuniary damages. See, also, Cheng, *Report on Modified No-Fault Automobile Insurance Plan in Ontario* (February 25, 1986), in State Farm Insurance Companies, *Submission To: The Ontario Law Reform Commission Project on Compensation for Personal Injury and Death* (May 31, 1986), Appendix A. "Nuisance" and "minor injury" cases accounted for 72% of claims, "non-economic loss" for 86% of damages paid in "nuisance" cases and 76% in "minor injury" cases (Exhibit 2A to Appendix A).

[17] *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, note 2, at 264.

[18] [1937] A.C. 826, [1937] 3 All E.R. 359 (H.L.) (subsequent reference is to [1937] 3 All E.R.).

[19] *Ibid.*, at 371-72.

In *Benham v. Gambling*,[20] the House of Lords stated that damages should be assessed on the basis of "an *objective* estimate of what kind of future on earth the victim might have enjoyed...". A reasonable and moderate figure should be awarded.[21]

As we have said, loss of the amenities of life refers to the loss of the ability to engage in normal activities and, therefore, the loss of the ability to enjoy life to its fullest. Loss of the amenities of life, together with shortened expectation of life, have frequently been distinguished from pain and suffering on the basis that the last mentioned head of damage is said to be subjective, whereas the first two are said to be objective. This means, presumably, that pain and suffering depend upon an awareness of these conditions on the part of the victim, while loss of amenities and shortened expectation of life can be said to exist notwithstanding the victim's lack of awareness. Thus, in *H. West & Son Ltd. v. Shephard*,[22] a majority of the House of Lords declined to award damages for pain and suffering to an unconscious plaintiff, but did award damages for loss of amenities and shortened expectation of life.

This case was followed by the Supreme Court of Canada in *The Queen in right of Ontario v. Jennings*,[23] but without any analysis of the issues. However, the minority in the House of Lords in *H. West & Son Ltd. v. Shephard* and the majority of the High Court of Australia in *Skelton v. Collins*[24] believed that the damages awarded under the three different heads served roughly the same purpose—solace—and that that purpose would not be advanced by an award to an unconscious plaintiff.[25]

(d) Conclusion

Professor Anthony Ogus[26] has outlined three approaches to the assessment of damages for lost amenities:[27] the conceptual approach, which treats

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[20] [1941] A.C. 157, at 167, [1941] 1 All E.R. 7 (H.L.) (emphasis added).

[21] See, also, *Bechthold v. Osbaldeston*, [1953] 2 S.C.R. 177, 4 D.L.R. 783, and *Northland Greyhound Lines Inc. v. Bryce*, [1956] S.C.R. 408, 3 D.L.R. (2d) 81.

[22] [1964] A.C. 326, [1963] 2 W.L.R. 1359 (H.L.). This case followed *Wise v. Kaye*, [1962] 1 Q.B. 638, [1962] 2 W.L.R. 96 (C.A.).

[23] *Supra*, note 14.

[24] *Supra*, note 15.

[25] In the words of Mr. Justice Windeyer of the High Court, damages for non-pecuniary loss are "solace for a condition created" rather than "payment for something taken away" (*ibid.*, at 495). See, also, Pearson Report, *supra*, note 11, paras. 393-95, at 91-92.

[26] Ogus, "Damages for Lost Amenities: For a Foot, a Feeling or a Function" (1972), 35 Mod. L. Rev. 1.

[27] Professor Margaret Somerville suggests that the three different methods could be applied to pain and suffering as well: see Somerville, "Pain and Suffering at Interfaces of Medicine and Law" (1986), 36 U. Toronto L.J. 286, at 291-92.

faculties as personal assets, each having an objective "value"; the personal approach, which attempts to evaluate the past, present, and future loss of pleasure and happiness of each injured person; and the functional approach, which awards such a sum as might be used to provide the injured individual with reasonable solace.[28]

In the trilogy, the Supreme Court of Canada considered these three methods of assessment and purported to choose the functional approach. In *Andrews*, Mr. Justice Dickson stated:[29]

> If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities. The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries. The result is a coordinated and interlocking basis for compensation, and a more rational justification for non-pecuniary loss compensation.

At the same time, however, the Court brought an element of subjectivity into the calculation. Notwithstanding that such awards are arbitrary or conventional and that assessability, uniformity, and predictability are important, the Court was of the view that they must have some regard for the individual situation of the victim:[30]

> For example, the loss of a finger would be a greater loss of amenities for an amateur pianist than for a person not engaged in such an activity. Greater compensation would be required to provide things and activities which would function to make up for this loss.

Thus, the view of the Supreme Court of Canada may be summed up in the following propositions. There should be recognition by the law, through an award of damages, that the injury victim has suffered distress and a sense of loss. There is, however, no conclusive test of the appropriate amount of damages to compensate the victim. The award, which must be arbitrary, should be substantial, but limited and, in a sense, conventional. The amount of the award was set by the Supreme Court of Canada at $100,000, in 1978 dollars,[31] in cases involving two quadraplegic plaintiffs and one-brain damaged plaintiff, and was described by the Court as a "rough upper limit" for non-pecuniary loss generally.

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[28] Professor Somerville argues that different approaches could be taken to the award of damages for non-pecuniary loss. For example, a subjective approach could be taken to the award of damages for pain and suffering, while an objective approach could be taken to loss of amenities. See *ibid.*, at 291.

[29] *Supra*, note 2, at 262.

[30] *Ibid.*, at 263.

[31] This figure is now just under $200,000. See, for example, *Scarff v. Wilson* (1986), 10 B.C.L.R. (2d) 273, 39 C.C.L.T. 20 (S.C.), where an award for non-pecuniary damages of

In the subsequent case of *Lindal v. Lindal*,[32] in which the Supreme Court of Canada took the opportunity to "continue the exposition" of the principles sketched in the trilogy,[33] the Court rejected what has been called the comparative approach to determining damages for non-pecuniary loss. It was of the view that the amount recovered does not depend on the seriousness of the injury or the extent of the plaintiff's "lost assets"; accordingly, courts should not measure the difference in value between the losses caused by different injuries, so that a person injured only half as seriously would receive only half as much.[34] However, while a sliding scale for awards was rejected, the Court did countenance some degree of flexibility in the awards given to different plaintiffs; consequently, some sort of comparison between victims was, it seems, necessarily contemplated.

On the question whether damages should be awarded for lost amenities to someone who is not aware of the loss, the Supreme Court's decision in *Andrews v. Grand & Toy Alberta Ltd.* may be seen to imply that they should not, although the point is not made explicit and there is no reference to *The Queen in right of Ontario v. Jennings*. If the objective of the damage award is the provision of reasonable solace for misfortune—that is, physical arrangements that can make life more endurable—then that objective cannot be met. Money will not, to use Dickson J.'s words, "serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way".[35] However, as we have seen, conflicting approaches have been taken in England and Australia, and distinctions have been drawn between pain and suffering, on the one hand, and loss of amenities, on the other.[36]

4. SURVIVAL OF ACTIONS

As we have seen,[37] at common law, tort actions did not survive the death of the injured person in favour of his estate.[38] However, all Canadian

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$188,842 was made; *Baumeister v. Drake* (1986), 5 B.C.L.R. (2d) 382, 38 C.C.L.T. 1 (S.C.), where there was an award for non-pecuniary damages of $181,783; and *Mitchell v. U-Haul Co. of Can. Ltd.* (1986), 47 Alta. L.R. (2d) 193 (Q.B.), where an award was made for non-pecuniary damages of $181,000.

[32] *Lindal v. Lindal*, [1981] 2 S.C.R. 629, 129 D.L.R. (3d) 263 (subsequent references are to [1981] 2 S.C.R.).

[33] *Ibid.*, at 630.

[34] *Ibid.*, at 641-43. See, also, *Richards v. B & B Moving & Storage Ltd.*, unreported (June 27, 1978, Ont. C.A.).

[35] *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, note 2, at 262.

[36] See text accompanying notes 13-14 and 22-25, *supra*.

[37] *Supra*, ch. 2, sec. 2(b)(i).

[38] For a discussion of survival actions, see Waddams, *The Law of Damages* (1983), ch. 12; Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), ch. 8; and Luntz, *Assessment of Damages for Personal Injury and Death* (2d ed., 1983), ch. 9, sec. 1.

jurisdictions have adopted legislation reversing this position,[39] although no two jurisdictions have enacted precisely the same provisions. Presumably reflecting the controversial nature of the issues involved, Canadian provisions respecting damages for non-pecuniary loss vary from outright refusal to permit such an award (in Alberta, New Brunswick, Newfoundland, Nova Scotia, and Prince Edward Island) to allowance of an award under some heads of non-pecuniary loss, although, except in the Yukon and the Northwest Territories, not for loss of expectation of life.

In Ontario, section 38(1) of the *Trustee Act*[40] provides for the survival of actions as follows:

> 38.—(1) Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased; but if death results from such injuries no damages shall be allowed for the death or for the loss of the expectation of life, but this proviso is not in derogation of any rights conferred by Part V of the [*Family Law Act, 1986*[41]].

Two points should be noted concerning section 38(1). First, damages for death or for loss of the expectation of life are excluded only "if death results from such [tortiously caused] injuries". Accordingly, such damages are presumably recoverable by the injured person's estate where that person's death is caused independently of the injuries brought on by the conduct of the defendant tortfeasor.

Secondly, while at first blush loss of amenities appears to be recoverable under section 38(1)—because it has not been expressly excluded—in the British Columbia case of *Child v. Stevenson*[42] it was held that the statutory exclusion "for the death" of an injured person effectively precluded an award for loss of amenities.[43] However, "if death was delayed, the claim for loss of amenities (which relates to the period while the deceased remained alive) seems untouched by the statute; the loss is not 'for the death' nor 'for the loss of expectation of life' ".[44]

It has been argued that, given the similarity of the British Columbia and Ontario provisions, the award of damages for loss of amenities in Ontario is

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[39] See Waddams, *supra*, note 38, at 593, *n*. 2.

[40] R.S.O. 1980, c. 512.

[41] *Supra*, note 6.

[42] (1973), 37 D.L.R. (3d) 429 (B.C.C.A.). But see *Krujelis v. Esdale* (1971), 25 D.L.R. (3d) 557 (B.C.S.C.).

[43] *Supra*, note 42, at 436-37.

[44] Cooper-Stephenson and Saunders, *supra*, note 38, at 394, *n*. 92, commenting on *Child v. Stevenson*, *supra*, note 42.

subject to the same restrictions, that is, damages "are restricted to the period before death, and the death must have been independently caused".[45]

In the trilogy, the Supreme Court of Canada said that damages for the non-pecuniary losses of a living plaintiff should not be assessed separately; rather, a global award ought to be made. Presumably, however, in a survival action by the estate, the exclusion of loss of the expectation of life and, perhaps, loss of amenities, would serve to reduce the award. Section 38(1) of the *Trustee Act* does, in fact, differentiate between the usual heads of non-pecuniary loss—by specifically excluding one and perhaps inferentially excluding another—thereby compelling the courts to focus on each head separately.

While, in Ontario, damages under certain heads of non-pecuniary loss are recoverable by the deceased's estate, the measure of damages is clearly affected by the death. Two commentators have stated the general rule in Anglo-Canadian jurisdictions in this way:[46]

> But though a claim survives, the death will frequently affect the measure of damages, sometimes drastically....[W]here the victim dies his estate will almost invariably recover less than would have been recovered *inter vivos*; so much so that in some instances the right of the estate to sue turns out to be illusory.
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> ....
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> Since the law preserves only such rights as were vested in the deceased immediately before he died, the general rule is that an estate can recover in respect of all the losses for which the injured party would have been compensated had he survived to pursue his claim, subject only to the effect of the death on the substance of those losses. However, most jurisdictions have legislatively modified this rule, in one or both of two ways: (a) by excluding some damages normally allowed, *e.g.*, damages for non-pecuniary loss, and (b) by allowing some damages normally excluded, *e.g.* funeral expenses. In the result, the measure of damages in a survival action is the above-stated general rule as amended, if at all, by the statute in question. This measure is applicable to all relevant heads of damage....

With respect to the quantification of non-pecuniary loss in survival actions, the commentators argue that "generally speaking this cannot be on

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[45] *Ibid.*, at 394. Another suggestion respecting s. 38(1) is that the phrase "for the death" has much the same scope as damages for loss of expectation of life, which is expressly dealt with in the section: Waddams, *supra*, note 38, para. 1036, at 598.

[46] Cooper-Stephenson and Saunders, *supra*, note 38, at 386 and 387-88. See, also, Waddams, *supra*, note 38, para. 1038, at 601, where he says that damages for pain and suffering, recoverable in Ontario by the estate, are limited by the plaintiff's shortened life. In the case of instantaneous death, it has also been held that the claim for loss of amenities and the claim for shortened expectation of life are duplicative, although this may not be so where the deceased survived for a while before dying; in the latter case, a claim for loss of amenities could refer to the period prior to death. See *Crosby v. O'Reilly*, [1975] 2 S.C.R. 381, (1974), 51 D.L.R. (3d) 555 (subsequent reference is to [1975] 2 S.C.R.), and Cooper-Stephenson and Saunders, *supra*, note 38, at 394-95.

the same basis as in personal injury suits",[47] where the Supreme Court of Canada's functional approach governs. As a result, courts tend to utilize "a modified version of the personal approach", described earlier,[48] focusing mainly, although not exclusively, on the deceased's age. However, the functional analysis of damage awards for non-pecuniary loss does have a moderating effect on the quantum of such awards in survival actions, since it is recognized that the sum awarded cannot, in fact, benefit the victim. On the other hand, it has been noted that, unlike English courts, Canadian courts generally do not award what amounts to a conventional sum and are more generous than their English counterparts.[49]

Yet, notwithstanding moderation in awards of damages for non-pecuniary loss in survival actions, both in Canada and elsewhere, such awards have come under attack in several jurisdictions. The "principal criticism" of a possible claim for loss of expectation of life by the estate of the deceased has been "that such a claim [is] personal to the deceased and when vested in his personal representative, [does] not further the purposes of compensation", since the "award benefitted someone who had not suffered any loss".[50] As we have seen, in Canada this argument has prevailed in all but one jurisdiction, insofar as loss of expectation of life is concerned, but (at least in terms of express statutory language) not universally in respect of claims for pain and suffering and loss of amenities: damages under the latter two heads remain recoverable in some jurisdictions despite the apparent theoretical applicability of the "principal criticism" just described.

In the end, however, the prevailing judicial theory underlying the measure of damages in survival actions, and the way in which the courts actually quantify non-pecuniary loss in such actions, render the issue of much less importance than compensation to a living victim. Indeed, it appears that, in Canada, except for the two territories, "the question of compensation for non-pecuniary loss in survival actions is, practically speaking, insignificant".[51]

5. OTHER JURISDICTIONS

In this section, the Commission will describe briefly the law and major approaches to reform in other jurisdictions in respect of damages for non-pecuniary loss. We shall consider awards to living plaintiffs as well as awards

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[47] Cooper-Stephenson and Saunders, *supra*, note 38, at 396.

[48] See *ibid.*, at 397, and *supra*, this ch., sec. 3(d).

[49] Cooper-Stephenson and Saunders, *supra*, note 38, at 398-99. See *Benham v. Gambling*, *supra*, note 20, where the House of Lords held that the award for loss of expectation of life was to be a conventional sum. See, also, Waddams, *supra*, note 38, para. 1037, at 599-600.

[50] Manitoba Law Reform Commission, *Report on The Estate Claim for Loss of Expectation of Life*, Report #35 (1979), at 4.

[51] Cooper-Stephenson and Saunders, *supra*, note 38, at 393, and Supplement (1987), at 27.

in favour of the estates of deceased victims. It bears noting at the outset that, with respect to compensation to living victims for pain and suffering, loss of amenities, and shortened expectation of life, a policy of restraint is to be found in other Canadian jurisdictions, and, as we shall see, in England and Australia. This policy is reflected as well in awards to the estates of deceased victims.

(a) CANADA

In 1984, the Law Reform Commission of British Columbia published its *Report on Compensation for Non-Pecuniary Loss*.[52] In its Report, the Commission, critical of the Supreme Court's imposition of what the Court called a "rough upper limit", argued that no such limit was necessary in order to ensure that damage awards would not escalate beyond what was justified by inflation.[53] Moreover, the Commission believed that it was undesirable to roll back damages for non-pecuniary loss awarded by the courts prior to the trilogy "to what the Supreme Court of Canada perceived to be moderate levels".[54] Accordingly, the Commission recommended that legislation should abolish the upper limit as established by the trilogy. However, at the same time, it argued in favour of a "fair upper reference point",[55] which it thought was represented by the trial award of $200,000 in *Thornton*. Adjusted for inflation, because the award was made in 1975, the Commission, in its earlier Working Paper,[56] had "tentatively proposed that legislation should confirm that the rough upper limit for damages for non-pecuniary loss be set at $400,000 as of April, 1983".[57] The Commission reaffirmed this position in its subsequent Report.[58] After what it said would be some "temporary uncertainty", "[a]ppellate review will quickly restore certainty to assessing damages for non-pecuniary loss and ... in short order, general ranges of compensation for particular kinds of injuries will be established".[59]

The British Columbia Commission recognized that, in one sense, the $400,000 limit was no more readily justifiable than any other level, except that it accorded with what the courts had been assessing, whereas in the trilogy the Supreme Court of Canada "had rolled back damages for non-

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[52] Law Reform Commission of British Columbia, *Report on Compensation for Non-Pecuniary Loss*, LRC 76 (1984) (hereinafter referred to as "B.C. Report").

[53] *Ibid.*, at 26.

[54] *Ibid.*

[55] *Ibid.*

[56] Law Reform Commission of British Columbia, *Compensation for Non-Pecuniary Loss*, Working Paper No. 43 (1983).

[57] B.C. Report, *supra*, note 52, at 27. Note the reference to a "rough upper limit".

[58] *Ibid.*, at 29.

[59] *Ibid.*, at 31.

pecuniary loss by selecting an upper limit which was significantly less than awards that had been made for the most serious kinds of injuries".[60]

Survival of actions for damages for non-pecuniary loss has been considered by law reform agencies in two Canadian jurisdictions. In 1977, the Alberta Institute of Law Research and Reform issued a Report on the subject.[61] The Institute's conclusions respecting the estate's claim for damages for loss of expectation of life—conclusions that the Institute said applied equally to loss of amenities and pain and suffering—were as follows:[62]

> We think that the estate's claim for damages for loss of expectation of life should be abolished. By its very nature it cannot go to the person who has suffered the injury because he is dead; it must be a windfall for others who may be creditors, non-dependant beneficiaries or dependant beneficiaries. It is against the whole conception of the common law to compensate a person who has not suffered. Secondly, the amount of the award is artificial and continues to create problems. . . . Thirdly, the award does not help dependants because if they are beneficiaries of the estate the sum they receive is deducted from the amount they are entitled to under the Fatal Accidents Act.

The Institute accepted the argument that "the natural feelings of the survivors call for some pecuniary recognition".[63] However, it was of the view that such recognition should come not by means of an estate claim for damages for non-pecuniary loss, but rather in the form of compensation for "bereavement",[64] which would not survive to the estate of the deceased relatives who would be given this right of action.[65]

The Institute acknowledged that a consequence of its proposal would be that "the plaintiff's recovery of damages for loss of expectation of life will depend on his surviving to judgment, which is a matter of chance".[66] However, it viewed its proposed compensation for bereavement as a sufficient counterbalance.

The Legislative Assembly of Alberta subsequently enacted the *Survival of Actions Act*.[67] Section 5 of this Act provides, among other things, that

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[60] *Ibid.*, at 27.

[61] Alberta, Institute of Law Research and Reform, *Survival of Actions and Fatal Accidents Act Amendment*, Report No. 24 (1977).

[62] *Ibid.*, at 14.

[63] *Ibid.*

[64] *Ibid.*, at 16 *et seq.*

[65] *Ibid.*

[66] *Ibid.*, at 15.

[67] R.S.A. 1980, c. S-30.

where a cause of action survives, "damages for loss of expectation of life, pain and suffering, physical disfigurement or loss of amenities are not recoverable".

In 1979, the Manitoba Law Reform Commission reported on survival of actions in respect of loss of expectation of life.[68] The Commission described the origins of the claim by living plaintiffs and the difficulties faced by courts in attempting to assess damages under this head. Existing legislation and law reform agency proposals to preclude such claims vesting in the estate of a deceased were discussed and endorsed. A majority of the Commission recommended that the estate's claim for damages for loss of expectation of life should be abolished, to be replaced by a new cause of action, vested in third parties, for loss of guidance, care, and companionship.[69]

One Commissioner dissented, quoting with approval the passage by Lord Wright in *Rose v. Ford*, reproduced earlier in this chapter.[70] He dismissed several arguments against the retention of claims by the estate for the shortening of the deceased's life, including the contention that, since the deceased cannot benefit directly from the award, it ought not to be made.[71] He also attempted to counter the view that an award would amount to a windfall to the estate:[72]

> It has been stated that an estate's creditors are sometimes the only ones to benefit from an award granted under '*The Trustee Act*'. Where is the windfall in this regard? Surely it is the honourable discharge of an executor's or personal representative's duties to pay all debts that are justly incurred by the deceased. Most certainly, the deceased, if he were alive, would be gratified in having his economic liabilities discharged. This is in furtherance of a proper policy of the law, and in many instances would directly benefit a deceased's heirs and beneficiaries. It would lead, in many instances, to more money being available upon the ultimate distribution of an estate's assets to estate beneficiaries.

Finally, responding to the proposal of the majority for a new "fatal accidents" cause of action, he stated:[73]

> In my respectful opinion, to award damages for loss of expectation of life under the guise of 'solatium' or for 'loss of guidance, care and companionship' is unconscious intellectual subterfuge. If a layman were to be asked why a deceased's estate should not receive a payment for loss of expectation of life, his probable response would be 'why not?'. This is no more illogical than other

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[68] *Supra*, note 50.

[69] *Ibid.*, at 25. See *An Act to Amend The Fatal Accidents Act and The Trustee Act*, S.M. 1980, c. 5.

[70] *Supra*, note 18. The passage is quoted in the text following note 19, *supra*.

[71] *Supra*, note 50, at 29.

[72] *Ibid.*, at 30.

[73] *Ibid.*, at 32.

illogicalities in the field of law. It would appear to be the most direct, responsible and cogent method of awarding damages. It would serve, in most respects, to assuage the anomaly that is raised by the oft quoted maxim 'it is cheaper to kill than to maim'. A direct payment to the estate would not serve to fully eradicate this anomaly; but I do not think that it is the proper function of the law to attempt to do so.

(b) United Kingdom

In the United Kingdom, starting with *Phillips v. London and South Western Railway Co.*,[74] which allowed damages under non-pecuniary heads, but which specified that the amount awarded should be "fair and reasonable compensation under all the circumstances of the case", the courts have used language calculated to induce restraint.[75]

The decision of the Court of Appeal in *Walker v. John McLean & Sons Ltd.*,[76] upholding an award of £35,000 to a sixteen and a half year old paraplegic for pain and suffering, loss of amenities of life, and shortened expectation of life is consistent with this view and with Canadian decisions. So, too, is the decision of the House of Lords in *Lim v. Camden and Islington Area Health Authority*.[77] While neither of these cases discusses the issue as thoroughly as the Supreme Court of Canada, there is a clear indication in the *Lim* case that conventional, moderate awards are justified, but with the recognition that increases to offset inflation are necessary "if only to prevent the conventional becoming the contemptible".[78]

In 1971, the English Law Commission published its Working Paper on assessment of damages,[79] followed in 1973 by its final Report.[80] The

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[74] (1874), 4 Q.B.D. 406, at 408.

[75] See *Scott v. Musial*, [1959] 2 Q.B. 429, at 432, [1959] 3 W.L.R. 437 (C.A.), the report of which reproduces the following direction to the jury given by Mr. Justice Paull at the trial of the action (the appeal from which was unanimously dismissed):

> It is not going to be a grossly extravagant sum in the sense that you would say: 'I would not have that happened to me for a million pounds'.... Obviously it is not going to be a small sum; obviously it will be a substantial sum—you may think a pretty substantial sum, but of course not absurdly extravagant.... [A]lthough you realise that these injuries are very serious and the results are very unpleasant, you must not run away and give him a fantastic sum; you must take some sum which you think is reasonable for the defendant to pay and for the plaintiff to receive, and I can help you no further about that.

[76] [1979] 1 W.L.R. 760, [1979] 2 All E.R. 965 (C.A.).

[77] *Supra*, note 14.

[78] *Ibid.*, at 189.

[79] England, The Law Commission, *Personal Injury Litigation—Assessment of Damages*, Working Paper No. 41 (1971) (hereinafter referred to as "Law Commission W.P.").

[80] England, The Law Commission, *Report on Personal Injury Litigation—Assessment of Damages*, Law Com. No. 56 (1973) (hereinafter referred to as "Law Commission Report").

Commission was of the general view that it was not possible to devise legislative guidelines concerning the assessment of damages for non-pecuniary loss. Existing law in this regard, including the rule that no account should be taken of the fact that the victim cannot, in fact, use the damages awarded to him in respect of loss of amenities and loss of expectation of life, should continue to govern.[81] In addition, courts should assess damages without the use of a legislative tariff.[82]

In terms of the types of claim for non-pecuniary loss, the Law Commission recommended that "claims for damages for loss of expectation of life as a separate head of non-pecuniary loss be abolished, but that the court should be required to take into account, in assessing damages for pain and suffering, any suffering caused or likely to be caused by awareness of lost expectancy".[83] Even if damages were to continue to be awardable for loss of expectation of life, the Law Commission would preclude recovery of such damages by the deceased victim's estate, "mainly because persons who have not suffered any loss may get the benefit of the award".[84] However, the Law Commission was of the view that the survival of other claims for non-pecuniary loss raised different issues. The Report quoted[85] the following passage from its earlier Working Paper[86] in endorsing the survival of these claims:

> The deceased may have suffered severe pain over a considerable period before death and may even, during that time, have spent some of the damages he was advised he would recover; and, during this period, relatives may have so acted in looking after him as to be not undeserving of the reward he may have intended to bestow upon them. We can see no reason why, in justice, a victim's death, perhaps wholly unconnected with the injury, should lead to this compensation being taken away.

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[81] *Ibid.*, para. 31, at 10. See *Wise v. Kay*, *supra*, note 22, and *H. West & Son Ltd. v. Shephard*, *supra*, note 22 (discussed *supra*, this ch., sec. 3(c)), concerning the proposition that damages for loss of amenities and loss of expectation of life, "should not be reduced because the plaintiff could not use them" (Law Commission W.P., *supra*, note 79, para. 90, at 46). The Working Paper did note, however, that "there are ... considerable difficulties in defining what is meant by 'use'" (*ibid.*, para. 91, at 47). For example, "[i]s money 'used' if it is bequeathed by will?" (*ibid.*). Must the victim be aware of such potential "use"? The Working Paper stated that "[e]ven in cases of lack of consciousness there is no reason why the money should not be spent by the relatives in seeking to establish contact with the plaintiff and in helping him, where possible, to return to some form of life" (*ibid.*, para. 92, at 47).

[82] Law Commission Report, *supra*, note 80, paras. 32-35, at 10-11.

[83] *Ibid.*, para. 99, at 26.

[84] *Ibid.*, para. 100, at 26.

[85] *Ibid.*, para. 101, at 27.

[86] Law Commission W.P., *supra*, note 79, para. 67, at 36. For a comment on the quoted passage in the Working Paper, see Luntz, *supra*, note 38, para. 9.1.05, at 396, reproduced *infra*, note 166.

After the publication of the Working Paper, criticism was levelled at this view on the ground that the money would not benefit the victim, but would be distributed to some relative or even to the deceased's creditors. But for reasons that relate in part to certain procedural changes in the United Kingdom, the Law Commission affirmed its earlier provisional proposal that claims for damages for non-pecuniary loss, other than for loss of expectation of life, should continue to survive for the benefit of the estate.[87]

In 1978, the United Kingdom Royal Commission on Civil Liability and Compensation for Personal Injury issued its Report (the Pearson Report).[88] The Report noted that "[t]here was no significant pressure ... for the abolition of damages for non-pecuniary loss".[89] However, while it did "consider that there is a place for damages for non-pecuniary loss",[90] and did recommend the retention of awards for loss of amenities[91] and, by a majority, for pain and suffering,[92] the Report proposed that "damages for loss of expectation of life as a separate head of damage should be abolished".[93] Such damages, it said, had "an air of unreality"[94] and should be replaced by "an award [to specified relatives of the deceased] for loss of society on Scottish lines".[95]

Insofar as loss of amenities and pain and suffering are concerned, the Report rejected a legislative tariff to control awards. However, "struck by the high cost of compensation for non-pecuniary loss",[96] the Report did recommend, by a majority, that "no damages should be recoverable for non-pecuniary loss suffered during the first three months after the date of injury".[97] The Royal Commission was equally divided on the issue whether a "ceiling" should be imposed on awards for non-pecuniary loss: some members were of the view that "a maximum could ... act as a useful point of reference for the courts",[98] while others believed that the appellate courts "can—and do—secure a reduction of awards which are excessive", so that "the introduction of a statutory maximum would be an unnecessary

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[87] Law Commission Report, *supra*, note 80, para. 104, at 28.

[88] *Supra*, note 11.

[89] *Ibid.*, para. 361, at 86.

[90] *Ibid.*, para. 362, at 86.

[91] *Ibid.*, para. 380, at 89.

[92] *Ibid.*, para. 381, at 89.

[93] *Ibid.*, para. 372, at 87.

[94] *Ibid.*, para. 371, at 87.

[95] *Ibid.*, para. 370, at 87. See *ibid.*, paras. 418 *et seq.*, at 96 *et seq.*

[96] *Ibid.*, para. 382, at 89.

[97] *Ibid.*, para. 388, at 90.

[98] *Ibid.*, para. 391, at 91.

complication".[99] However, all were agreed that the "emphasis in compensation for non-pecuniary loss should ... be on serious and continuing losses, especially loss of faculty"[100] and that some type of control on awards should exist.

The Report also concluded that the assessment of damages raised particular difficulties in the case of the permanently unconscious plaintiff. The Royal Commission noted the widely divergent views on this issue, depending in part on whether one sees the award as compensation for a loss, determined objectively, or as solace.[101] The Commissioners did "not think it is possible to regard either of these approaches as necessarily right and the other as necessarily wrong".[102] However, on balance it recommended that "non-pecuniary damages should no longer be recoverable for permanent unconsciousness",[103] since such damages should be awarded "only where they can serve some useful purpose, for example, by providing the plaintiff with an alternative source of satisfaction to replace one that he has lost".[104]

Finally, in dealing with the survival of actions, the Report recommended that "claims for pain and suffering and loss of amenity should continue to survive for the benefit of the claimant's estate".[105] The Report quoted with approval the passage in the English Law Commission's Working Paper reproduced above.[106]

Insofar as claims for loss of expectation of life are concerned, the proposals in both the English Law Commission Report and the Pearson Report ultimately had their effect. In 1982, Parliament in the United Kingdom enacted the *Administration of Justice Act 1982*,[107] section 1(1) of which provides as follows:

> 1.—(1) In an action under the law of England and Wales or the law of Northern Ireland for damages for personal injuries—
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> (a) no damages shall be recoverable in respect of any loss of expectation of life caused to the injured person by the injuries; but

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[99] *Ibid.*, para. 392, at 91.

[100] *Ibid.*, para. 384, at 90.

[101] *Ibid.*, paras. 394-95, at 91-92.

[102] *Ibid.*, para. 396, at 92.

[103] *Ibid.*, para. 398, at 92.

[104] *Ibid.*, para. 397, at 92.

[105] *Ibid.*, para. 444, at 100.

[106] *Ibid.*, para. 442, at 100. The passage is reproduced in the text following note 86, *supra*.

[107] C. 53. The abolition of claims in respect of loss of expectation of life made it unnecessary to amend, in this respect, the *Law Reform (Miscellaneous Provisions) Act, 1934*, c. 41, which provides for the survival of causes of action to a deceased's estate. This was noted by the Law Commission: Law Commission Report, *supra*, note 80, para. 100, at 26.

(b) if the injured person's expectation of life has been reduced by the injuries, the court, in assessing damages in respect of pain and suffering caused by the injuries, shall take account of any suffering caused or likely to be caused to him by awareness that his expectation of life has been so reduced.

(c) New Zealand

In 1982, New Zealand passed the *Accident Compensation Act 1982*,[108] which consolidated and revised the *Accident Compensation Act 1972*[109] and its subsequent amendments.[110] Pursuant to these enactments, a no-fault accident compensation plan was introduced in New Zealand. The plan provides for awards for non-pecuniary loss, but sharply limits them. Section 78 of the 1982 Act permits an award of up to NZ$17,000 as compensation for non-pecuniary losses involving "the permanent loss or impairment of any bodily function", assessed on the basis of a schedule that attributes a percentage loss to each part of the body. Where an injury does not appear on the schedule, the Accident Compensation Corporation is empowered to pay the sum it considers appropriate. Under section 79, up to NZ$10,000 may be awarded for loss of amenities or capacity for enjoying life, including disfigurement and pain and mental suffering (the latter of which would comprehend nervous shock). No compensation is payable under this section unless the Corporation is of the opinion that "having regard to its nature, intensity, duration, and any other relevant circumstances", the loss or the pain is serious enough to justify payment.[111] According to one commentator, section 79 has been the most contentious section in the Act.[112]

(d) Australia

In Australia, the case law reflects an outlook similar to that manifested in the English cases. While the courts have rejected the idea of a tariff and have indicated that each case must be judged on its own facts, at the same time they have favoured consistency and, evidently, moderation in awards for non-pecuniary loss.[113]

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108 1982, No. 181.

109 1972, No. 43.

110 See *supra*, note 108, Second Schedule, Part I.

111 *Supra*, note 108, s. 79(1).

112 Palmer, "Lump Sum Payments Under Accident Compensation", [1976] N.Z.L.J. 368, at 370.

113 For example, in *Sharman v. Evans* (1977), 138 C.L.R. 563 (H.C.), the High Court of Australia reduced an award of AUS$80,000 for pain and suffering and loss of amenities experienced by a young quadraplegic to AUS$55,000. A separate award of AUS$6,000 for shortened expectation of life was reduced to AUS$2,000.

(e) United States

In the United States, on the other hand, damages for non-pecuniary loss tend to be much higher, although there are significant variations from area to area, in part, no doubt, because tort law is a state matter and different courts have different attitudes to compensation for non-pecuniary loss.

American terminology is not precisely parallel to our own. Section 905 of the Second Restatement of the Law of Torts states:[114]

> Compensatory damages that may be awarded without proof of pecuniary loss include compensation
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> (a) for bodily harm, and
>
> (b) for emotional distress.

Sometimes American courts speak of pain and suffering as embracing both physical and emotional distress and, apparently, as taking into account loss of amenities and shortened expectation of life.

An example of how dramatic a difference there can be in the American outlook, as compared with our own, is a decision of the Arizona Court of Appeals upholding a jury award of $2.5 million for pain and suffering in the case of a motor vehicle accident victim who had suffered brain damage that changed his personality, and scarring that is described as amounting to deformity, but who had a normal life expectancy.[115] The Court indicated that it would not interfere with a jury award unless it were "so outrageously excessive as to suggest, at first blush, passion or prejudice".[116] This, evidently, was not such a case. The Court rejected the idea of a conventional award or a schedule, on the basis that no two injuries and no two plaintiffs were the same. The Court also rejected the argument that awards should be limited for various policy reasons, asserting that there was no justification for restricting a plaintiff to less than appropriate compensatory damages. The Court evidently saw no circularity in this argument.

In 1986, the American Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability recommended limiting non-pecuniary damages, including punitive damages, to $100,000.[117] In fact, a considerable number

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[114] American Law Institute, *Restatement of the Law, Second—Torts 2d* (1979), § 905.

[115] *Wry v. Dial*, 503 P. 2d 979 (Ariz. Ct. App. 1973).

[116] *Ibid.*, at 991.

[117] *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* (1986), at 69.

of American states have now enacted dollar limits with respect to such damages.[118]

In California, for example, the Medical Injury Compensation Reform Act[119] provides that non-economic damages, to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other intangible damages, should be limited to $250,000 in personal injury accidents against health care providers. While the California limit is greater than the current value of the $100,000 upper limit set in the Supreme Court of Canada's trilogy, it is also fair to say that California is identified as one of the areas in the United States where jury awards have tended to be most generous. Hence, in a sense, the California limit established by statute represents an even more dramatic policy decision than that represented in Canada by the trilogy, which merely adopted as a "rough upper limit" an amount that had been among the highest awarded in personal injury cases prior to the decisions of the lower courts in *Thornton*, *Andrews*, and *Arnold*.[120]

6. ARGUMENTS AGAINST THE APPROACH IN THE TRILOGY

There is, of course, no demonstrably correct approach to the awarding of damages for non-pecuniary loss. It is, as Canadian, English, and other courts have repeatedly pointed out, an undertaking for which there is no objective measure.[121] The process can, however, be informed by a coherent policy so that the decision will not be arbitrary in the particular case; that is, it need not be contingent solely upon the unfettered discretion of a judge or a jury.

In this section, we shall examine briefly the contention that the present law, represented by the trilogy in the Supreme Court of Canada, is deficient and therefore ought to be reformed.[122] We leave to the next section the narrower questions of the respective roles of the judge and jury, survival of actions, and the award of damages for emotional distress alone.

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[118] See Council of State Governments, *Backgrounder* (December, 1985), which lists 32 states with such legislation.

[119] Cal. Civ. Code § 3333.2.

[120] But see, for example, *Jackson v. Millar*, [1972] 2 O.R. 197 (H.C.J.), where $150,000 was awarded for non-pecuniary loss. This award was left untouched in the Court of Appeal ([1973] 1 O.R. 399) and the Supreme Court of Canada ([1976] 1 S.C.R. 225).

[121] It has been said that, in the trilogy, the "monetary evaluation of non-pecuniary losses was held to be more a philosophical and policy exercise than a legal or logical one": Cherniak and Sanderson, *supra*, note 1, at 212.

[122] See, generally, B.C. Report, *supra*, note 52, esp. at 16-17. For a response to that Report, see Waddams, "Compensation for Non-Pecuniary Loss: Is There a Case for Legislative Intervention?" (1985), 63 Can. B. Rev. 734.

With respect to the recommendation in the B.C. Report to "abolish" the rough upper limit established in the trilogy, Waddams notes the "unresolved conflict" in the

In some cases, criticism of the present law has led to the conclusion that no award should be made for non-pecuniary loss. Two arguments can be raised in favour of such a policy. The first is that because many injury victims now go uncompensated for their pecuniary losses, it would be preferable to direct the money to meeting that shortcoming of the system rather than add it to the compensation of those whose pecuniary awards are adequate.

The other argument raised for abolishing damages for non-pecuniary loss is that such damages constitute a barrier to rehabilitation. It is said that the injury victim's belief that damages for non-pecuniary losses will be reduced by successful efforts on his part to overcome his injury can be subversive of rehabilitation.[123]

With respect to the first argument, it bears emphasizing that the abolition of the right to damages for non-pecuniary loss under the present tort system would not, in itself, serve to redirect the money to any other particular purpose. Redirection—in order to provide full compensation for pecuniary losses, where this is thought to be lacking, or for any other reason—would occur only where it is expressly mandated by a different type of compensatory regime. For example, the denial of damages for non-pecuniary loss tends to be associated with schemes of universal no-fault compensation, either for victims of a particular type of accident or for injury victims generally. In this connection, reference may be made to the Commission's *Report on Motor Vehicle Accident Compensation*,[124] in which we proposed a no-fault compensation scheme in respect of motor vehicle accidents. In that Report, it was recommended that "no compensation should be paid for non-pecuniary losses suffered as a result of a motor vehicle accident".[125] Workers' compensation schemes frequently exclude the possibility of such damages under certain circumstances. By providing compensation for all accident victims in respect of their pecuniary loss, they concentrate resources on the cost of care.

The second argument—concerning the allegedly negative effect of an award of damages for non-pecuniary loss on the rehabilitative efforts of injured persons—is, it appears, a factor in the abolition or limitation of such damages in many of the schemes described above. However, to the extent that the argument carries any weight, it does so only in respect of the period

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Report between the desire to impose a known limit, or "reference" point, on damages for non-pecuniary loss and the desire to give a "largely unfettered power in trial courts" to award such damages (*ibid.*, at 740).

[123] Ontario Law Reform Commission, *Report on Motor Vehicle Accident Compensation* (1973) (hereinafter referred to as "O.L.R.C. Report"), ch. VI. In the B.C. Report, *supra*, note 52, at 18, it was said that one argument allegedly favourable to an upper limit on non-pecuniary damages was that, without it—that is, if damages were "at large"—there would be "an incentive for personal injury victims to dwell on their misfortunes".

[124] O.L.R.C. Report, *supra*, note 123.

[125] *Ibid.*, at 107.

of time between the injury and the judgment. Once the quantum has been fixed by the court, any malingering by the plaintiff would serve no purpose and, accordingly, any disincentive to rehabilitation would be removed.

Finally, it should be noted that the two arguments considered above may, in fact, be used to advance a cause other than that of completely abolishing awards of damages for non-pecuniary loss. Assuming their validity, at least under some circumstances, it may be said that both of these arguments could be made by those who favour a conventional, limited award, like that endorsed in the trilogy, rather than no award at all.

Criticism of existing law also comes from those who favour a policy of higher awards, sometimes with no upper limit. Several arguments have been advanced in favour of higher awards. One argument that had been raised in the past is that a fixed limit involves the prospect of erosion by inflation.[126] But arguments based purely on the adverse effects of this factor can be easily countered. The courts are now prepared to take inflation into account in applying the upper limit imposed by the trilogy. In *Fenn v. City of Peterborough*,[127] the Ontario Court of Appeal justified an award of $125,000 for non-pecuniary damages on the ground that there had been an erosion in the value of money since the upper limit was established. The case went to the Supreme Court of Canada, which upheld the award, without commenting on the Court of Appeal's reasoning.[128] In *Lindal v. Lindal*,[129] although the Supreme Court of Canada upheld the decision of the British Columbia Court of Appeal to reduce a trial judgment from $135,000 for non-pecuniary damages to $100,000, it also stated:[130]

> Account may be taken of inflation in awarding damages and it is not suggested that the figure of $100,000 should not vary in response to economic conditions, in particular, the debasement of purchasing power as a result of inflation.

It has also been argued that, with an upper limit of $100,000, the amounts available for less serious injuries quickly diminish; but, again, the courts seem to have rejected the notion that there is a sliding scale, with the person injured only half as seriously receiving only half as much.[131] In *Lindal v. Lindal*, the Court explained:[132]

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[126] Cherniak and Sanderson, *supra*, note 1, at 220 *et seq.*

[127] (1979), 25 O.R. (2d) 399, 104 D.L.R. (3d) 174 (C.A.).

[128] *Sub nom. Consumers' Gas Co. v. City of Peterborough*, [1981] 2 S.C.R. 613, 129 D.L.R. (3d) 507.

[129] *Supra*, note 32.

[130] *Ibid.*, at 643.

[131] *Ibid.*

[132] *Ibid.*, at 637.

> [T]he amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the 'need for solace will not necessarily correlate with the seriousness of the injury' (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a 'tariff'. An award will vary in each case 'to meet the specific circumstances of the individual case' (*Thornton* at p. 284 of S.C.R.).

A further argument in favour of higher awards for non-pecuniary loss is that greater deterrence would thereby be achieved. While that proposition is no doubt true, the important issue from an economic perspective is obtaining the correct level of deterrence. Whether one is thinking in terms of deterring individuals from rash behaviour or deterring people generally from engaging in a particular activity, the economic argument is that the appropriate degree of deterrence is achieved by requiring that potential wrongdoers face the full social cost of their activities. Accordingly, on this analysis, the appropriate amount of damages from a deterrence standpoint is the social cost of the losses occasioned by the wrongful activity. But this principle does not readily dictate the appropriate amount of damages because the inquiry returns to the question, "What is the appropriate evaluation of the loss?". Unless it can be shown that the Supreme Court's approach does not amount to an adequate assessment of the injured person's losses, the economic conception of deterrence requires no greater award than that endorsed in the trilogy.

Some have argued, in effect, that damages for non-pecuniary loss should be sufficiently high—that is, beyond the Supreme Court of Canada's "rough upper limit"—to compensate the injured person for pecuniary losses not specifically dealt with or foreseen at trial.[133] The Commission cannot, however, see why the courts, or the Legislature, should do indirectly what

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[133] See Pearson Report, *supra*, note 11, para. 360, at 85. See, also, B.C. Report, *supra*, note 52, at 14-16. After appearing to make this type of argument, the B.C. Report stated (*ibid.*, at 15):

> We do not mean to suggest that damages for non-pecuniary loss should be considered as compensation for other heads of loss for which inadequate or no damages are awarded. We merely doubt whether it is safe to assert that adequate compensation on other heads of loss is sufficient reason to assess non-pecuniary losses moderately.

But then the B.C. Report made these comments (*ibid.*, at 16):

> Because of the uncertainty inherent in accurately estimating pecuniary loss, an award for non-pecuniary loss often provides a sum which safeguards the plaintiff from a financial shortfall arising because the assumptions made were wrong. Placing a ceiling on damages for non-pecuniary loss may seriously impair a function performed by those damages as an element of the whole process of adequately compensating the plaintiff.

they might do directly. If it is thought to be essential to expand the heads of damage for pecuniary loss in order to compensate the victim more fully, this ought to be done expressly. Damages to provide solace for such intangible "losses" as pain and suffering, loss of amenities, or loss of expectation of life should not be used as a means of rectifying any basic deficiency in the law relating to awards of damages for pecuniary loss.

Finally, it is said that the policy adopted by the Supreme Court of Canada in the trilogy simply results in inadequate compensation for injured persons with respect to non-pecuniary loss. In other words, it is an argument in favour of greater generosity—basically, more solace—to the victims of injury.

As we have said already, since all agree that there is no truly objective measure of the loss suffered, the determination concerning what constitutes appropriate compensation is a policy decision based on a number of considerations. The Supreme Court, in the trilogy, clearly directed its attention to whether the amount it was awarding was enough to compensate the injured party adequately for non-pecuniary loss. One may disagree,[134] but one cannot prove the Court wrong.[135]

In the trilogy, the Supreme Court of Canada partly justified its policy of restraint on the basis of what it considered to be the likely adverse effect on liability insurance premiums of unlimited and unpredictable awards. The Law Reform Commission of British Columbia was highly critical of the Supreme Court's reasoning with respect to the impact of insurance. The British Columbia Commission was of the opinion that the Court's assessment of the matter was superficial, resting partially on what it said was misleading—and, it appears, ultimately withdrawn—publicity, sponsored by the insurance industry in the United States, claiming that high damage awards would lead to prohibitively high insurance premiums. Indeed, it would appear that the Court's statements on the effect of damage awards on insurance premiums were not based on any empirical evidence; nor was the issue even argued before the Court.

See, also, *ibid.*, at 12: "[W]e have doubts whether damages for non-pecuniary loss serve any one narrow purpose. Confining the level of those damages overlooks a number of other kinds of loss for which a plaintiff usually receives no compensation".

[134] The B.C. Report, *ibid.*, at 21, stated:

> It [the limit imposed in the trilogy] has ... probably led to undercompensating personal injury victims generally.... The only conclusion that can be reached with absolute certainty is that the current 'limit' is far too low.

[135] In the B.C. Report, the dissenting Commissioner stated as follows (Memorandum of Dissent by Anthony F. Sheppard, *ibid.*, at 33):

> Critics of the rule have not shown and indeed cannot show convincingly that the limit is unfair because non-pecuniary losses cannot be objectively quantified and because $100,000 adjusted for inflation and with court order interest is a substantial sum of money.

The British Columbia Commission stated that damages for non-pecuniary loss generally represent a small portion of the total damage award, that awards are not as high as one would believe simply by reading newspaper accounts, and that American awards are, and will likely remain, higher than British Columbia awards because the cost of medical care is much greater in the United States.[136] The Commission conducted a study "to predict the impact on motor vehicle insurance premiums of higher awards for non-pecuniary loss",[137] and drew the conclusion that "concerns over the costs of insurance with respect to compensating for non-pecuniary loss were overstated by the Supreme Court of Canada".[138] It said that increases in premiums, while not nominal, would not be prohibitive.

We are of the view that the question whether the abolition of the trilogy's "rough upper limit" would result in dramatically increased liability insurance premiums cannot be answered conclusively without further empirical data. Arguments have been marshalled on either side; yet, since most evidence is anecdotal, answers are generally speculative and, we believe, will remain so for some time.[139]

The British Columbia Commission raised a further argument against the approach taken by the Supreme Court of Canada in the trilogy. The argument was that, in settling a "rough upper limit" for damages for non-pecuniary loss, the Supreme Court was usurping the role of the Legislature. While, for example, the Commission was willing to countenance the Court "[defining] the role to be played by damages for non-pecuniary loss", the

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[136] *Ibid.*, at 13.

[137] *Ibid.*, at 30.

[138] *Ibid.*

[139] However, it has been argued that "the cost of high awards is ultimately borne by large sections of the public through liability insurance premiums, and that unpredictability of awards as well as their large size increases the cost of insurance": Waddams, *supra*, note 122, at 736. The Ontario Task Force on Insurance also referred, *inter alia*, to the effect of large damage awards on liability insurance premiums (Ontario, *Final Report of the Ontario Task Force on Insurance* (1986), at 38):

> There is no doubt that the current insurance crunch is dominated by a crisis in liability insurance. As noted above, the causes of this crisis are difficult to discern but relate primarily to the extreme uncertainty associated with 'long-tail' risks. The insurer's exposure may extend for many years beyond the time when the insured occurrence took place, and systemic socio-legal and economic changes are constantly shifting the parameters of liability and quantum of damage. This uncertainty has made it impossible for insurers to price the various types of risks and has led directly to the severe problems in availability, adequacy and affordability of liability insurance coverage.

The Task Force indicated that the problem was not serious in all areas of liability-generating activity. The problem seemed most pressing for product manufacturers, municipalities, tavern owners, hotels, hospitals, volunteer groups, contractors, truckers, bus operators, and newspapers. The Task Force called for responses broader than the mere limitation of damages for non-pecuniary losses. But its conclusions do support such a limitation.

Commission was of the view that the Court "was not in the best position to determine whether to impose an arbitrary limit on damages for non-pecuniary loss".[140]

We cannot agree. We believe that it is the proper function of appellate courts to control damage awards. An appellate court, and particularly a court of last resort, must ensure that such awards are fair and consistent, that is, that they are fair as between plaintiffs similarly injured and as between defendants, as well as between the parties in individual cases. It does not appear to us that the objectives of fairness and consistency can be achieved unless there is some sort of scale for comparing one case with another. Any such scale must have an upper end, more or less clearly defined. In our opinion, it is not beyond the proper jurisdiction of an appellate court to indicate, for the guidance of trial courts, where that upper end lies.

7. CONCLUSIONS

(a) The Approach in the Trilogy

The Commission has come to the conclusion that, in a compensation regime based on the idea that a "wrongdoer" should pay for the injury done to another person, it is not appropriate to abolish awards of damages for non-pecuniary loss. We are unaware of any significant public sentiment in favour of abolishing the award of damages under this head.[141] While some surveys have suggested that people might be prepared to give up such compensation in favour of a system that provided compensation for all pecuniary losses on a no-fault basis,[142] this option does not come within the terms of reference of this Report. However, it bears emphasizing that even the no-fault accident compensation regime in New Zealand permits awards for non-pecuniary loss, although of a very modest amount.

Our endorsement of awards of damages for non-pecuniary loss applies equally to past, as well as present, pain and suffering. For some, the notion of "solace", the purpose advanced by the Supreme Court of Canada in the trilogy as the basis of damages for non-pecuniary loss, involves the spending of the award in order to furnish some form of comfort only for anticipated on-going pain and suffering. We believe, however, that the need for solace is not inconsistent with the memory and experience of past pain and suffering, and that it is the *receipt* of the award that furnishes that solace.[143]

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[140] B.C. Report, *supra*, note 52, at 16.

[141] In this connection, see Pearson Report, *supra*, note 11, para. 361, at 86.

[142] O.L.R.C. Report, *supra*, note 123, at 79.

[143] See Cooper-Stephenson and Saunders, *supra*, note 38, at 353-54, and Waddams, *supra*, note 38, para. 393, at 226-27.

In our view, once the decision has been made to retain awards of damages for non-pecuniary loss, the realistic choice is between accepting the general approach laid down by the Supreme Court of Canada in the trilogy, which embraces the idea of moderation in awards and a rough upper limit or, alternatively, recommending more liberal or indulgent awards, perhaps with no upper limit. At this level, the Commission has no trouble endorsing the approach enunciated by the Supreme Court of Canada. It is probably fair to say that no system fully accepts an approach that would involve no upper limit. Even in American jurisdictions, where awards that would be regarded as astronomical in Canadian terms have been permitted, it is nevertheless accepted that an appellate court has the authority to limit or reduce amounts assessed by juries. The importance of recognizing a sense of loss and attempting to provide solace must be balanced against the social burdens of indulgent awards, as well as the impossibility of equating distress with money.

Having said this, the question for the Commission ultimately comes down to what the upper limit should be. The argument for a higher, but still moderate, limit, consistent with the approach adopted by the Supreme Court of Canada, involves several strands, for example, that it would permit more flexibility and give greater scope for assessing adequate awards in less serious cases. In the end, however, the argument seems to be founded on the subjective belief that $100,000, adjusted for inflation but otherwise forming the limit except in very exceptional circumstances, is simply not enough and that the "laddering" effect this has on awards for less serious, but still severe, injuries results in inadequate awards for these injuries.

As we have indicated, in its 1984 Report the Law Reform Commission of British Columbia recommended that "[t]he rough upper limit on compensation for non-pecuniary loss established by the Supreme Court of Canada in the 'trilogy' [should] be abolished".[144] In its place, the Commission proposed a "fair upper reference point",[145] represented by the 1975 trial award of $200,000 in *Thornton*. The difference between the British Columbia Commission's "reference point" and the Supreme Court of Canada's "rough upper limit" is not altogether clear.[146] Both attempt to keep damages from escalating in an uncontrolled fashion and to provide consistency and certainty in awards for various kinds of injuries. Fundamentally, then, the distinction would appear to be simply that the reference point imposes the limit at a higher dollar figure.

By way of summary, the Commission believes that the goals of consistency, predictability, and fairness—as between one award and another, and as between awards in one province and awards in another—necessitate the retention of some sort of limit. Since money cannot alleviate pain and

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[144] *Supra*, note 52, at 31 (emphasis deleted).

[145] *Ibid.*, at 26.

[146] See Waddams, *supra*, note 122, at 735-36.

suffering or return to the injured person the lost years or lost amenities of life, and given the social burdens of indulgent awards, a reasonable, moderate award is required. In order to advance the goals referred to above, appellate review of lower court awards is essential. So long as some flexibility is assured, in order to deal with very exceptional cases demanding higher awards,[147] and so long as there is an adjustment for inflation in the level of awards, we believe that injured persons are adequately protected by the existing law respecting damages for non-pecuniary loss. If such persons are not properly compensated in respect of pecuniary losses, the remedy clearly lies in reform of that facet of the law. Indeed, it is an essential goal of our recommendations to ensure full recovery for such losses. Accordingly, the Commission recommends that there should be no change in the present law and practice, as enunciated by the Supreme Court of Canada in the trilogy, respecting awards of damages for non-pecuniary loss.[148]

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[147] After a review of the jurisprudence, Waddams concludes that "though in principle the limit might be exceeded on grounds of seriousness of injury, it will in practice be difficult to establish such a case" (*supra*, note 38, para. 381, at 219). See, generally, *ibid.*, paras. 379-81, at 217-19.

[148] Dr. H. Allan Leal, O.C., Q.C., Vice Chairman of the Commission, dissents from this recommendation:

> As Chairman of the Ontario Law Reform Commission, I was a signatory of its 1973 *Report on Motor Vehicle Accident Compensation*. The Commission at that time, apart from the Chairman, comprised three legal practitioners, one of whom specialized as counsel in these particular areas of litigation, and the fourth was the distinguished former Chief Justice of the High Court of Ontario whose judicial career necessarily involved in this area an intimate knowledge of the law and a broad experience in its decision making. The Report of the Commission was unanimous, including the recommendation that "no compensation should be paid for non-pecuniary losses suffered as a result of a motor vehicle accident."
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> Nothing that I have read or heard since then has persuaded me that our decision at that date was wrong and it is therefore with regret that I must dissent from the recommendation of my colleagues in the current Report with respect to the award of non-pecuniary damages. It goes without saying that if there is to be compensation for non-pecuniary loss I would support the view that an upper limit, adjusted from time to time for inflation, be fixed by legislation. The figure of $100,000 was determined in the *Andrews* case by the Supreme Court of Canada to be a proper award and my colleagues have recommended that the practice of our courts on this point since that case be confirmed. It is clear, of course, that the fixing of the figure at $100,000, subject to adjustment for inflation, is no less arbitrary and no more logical than any other figure.
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> It was said in the *Andrews* case that there is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. It must also be said that as a philosophical matter it is highly doubtful whether money can buy back happiness or palliate pain, and even assuming that it can, when does one establish where an infusion of dollars begins to be palliative and at what point in future dosage does one run into the law of diminishing returns? It is a given, of course, that everything that can reasonably be provided in terms of present and future care ought to be provided and certainly one should not skimp on the one with an expectation that the slack will be taken up on the other.
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> It has been said in our current Report that some surveys have suggested that the people might be prepared to give up damages for non-pecuniary losses as a *quid*

(b) Jury Assessment of Damage Awards

One point that has given rise to difficulty is whether, and, if so, the degree to which, guidance should be given to a jury in respect of the $100,000 limit. It has been the established rule that no specific figures should be mentioned by the trial judge, and this rule was reaffirmed by the Ontario Court of Appeal in 1984.[149] However, we believe that it is impossible to reconcile this approach with the requirement of rational analysis, rational explanation, and consistency of damage awards. It is true that empowering the judge to give guidance to the jury will reduce the independence, or at least the power, of the jury. But reduction of the jury's independence or power is not necessarily objectionable. Indeed, the history of trial by jury has witnessed the development of several devices for controlling the jury.[150]

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pro quo in a system that provided compensation for all pecuniary losses on a no-fault basis. As a factual matter that may very well be, but it must be stressed that this was not stated as the reasoning behind the recommendation in the Commission's 1973 Report. Whether my colleagues at that time, or any of them, harboured that view is not known. I certainly did not.

I have given much thought to the question whether any one of the customary tripartite divisions of non-pecuniary damages—loss of amenities of life, pain and suffering and loss of expectation of life—might justify the retention of an award. It seems to me that there are a few cases where the nature and the severity of the loss of an amenity would justify an award even where compensation for lost earning capacity was *not* a factor. One thinks in this connection of an accomplished and dedicated but non-professional pianist. Apart from quantum which would remain a substantial problem there would be the difficulty of separating this factor from, say, suffering. In result, I would not favour the award of damages even for loss of amenities. And I am aware that the *Andrews* case counsels us that there should be no attempt to hive off any one of the trilogy of factors in non-pecuniary loss.

As a policy matter we do not attempt to compensate our wounded soldiers, injured workers, and generally incapacitated persons for non-pecuniary loss. It is, of course, no answer to say that in the tort regime we are dealing with a matter strictly between the parties. In today's society compensation for personal injury under the tort regime is far from a private matter. This particular manifestation of social engineering is called loss distribution and affects us all. Compulsory automobile insurance is an obvious but certainly not the only example of this.

One is also aware that New Zealand's comprehensive no-fault accident compensation scheme provides for compensation for pain and suffering. Recent experience with the funding of the New Zealand plan and the "massive cost blow-out" in compensation payments has prompted a review committee to say that the scheme "could not continue in its present form".

In the end it comes down to this, that to attempt to compensate for non-pecuniary loss we are inevitably driven out of the realm of rationality and logic and into the type of guesswork which has earned for this particular branch of the law the sobriquet "the forensic lottery".

[149] *Howes v. Crosby* (1984), 45 O.R. (2d) 449, 6 D.L.R. (4th) 698 (C.A.). But see *Crosby v. O'Reilly*, *supra*, note 46, at 386-87, *per* Laskin C.J. (for the Court). See, also, Waddams, *supra*, note 38, at 218, *n*. 157.

[150] Watson, "Assisting the Jury in Assessing General Damages—*Gray* v. *Alanco Developments* Revisited" (1970), 48 Can. B. Rev. 565, at 574.

Against the advantages of jury independence must be weighed the need for fairness, consistency, and rationality in damage awards, and the expense and inconvenience—some might say the absurdity—of compelling the trial judge to enter judgment for an amount that he knows is contrary to law, and must be set aside on appeal, with the consequent necessity of another jury assessment with, perhaps, the same defects as the first.[151] We believe, therefore, that complete deference to jury awards is no longer appropriate. Accordingly, it is recommended that, in the trial of an action for damages for personal injuries, the judge should be empowered to give guidance to the jury concerning the quantum of damages for non-pecuniary loss.[152]

It is further recommended that, in order to advance the goals of fairness and rationality, counsel should have the right to make submissions to the judge or the jury, as the case may be, on the quantum of damages.[153] We believe that any excess by counsel in this regard can and should be dealt with by the trial judge in the same way in which he would deal with any inappropriate behaviour, that is, pursuant to the judge's overriding discretion to control proceedings of the court.

Finally, the Commission recommends that an appellate court should have power, when setting aside a jury assessment of damages for non-pecuniary loss, to substitute its own assessment, instead of ordering a new trial, if it thinks this to be just in the circumstances.[154] A similar power should continue to be exercisable in the case of an appellate court review of a judicial assessment of damages.

(c) Survival of Actions

A further matter arising in connection with non-pecuniary loss concerns damages awarded to the estate upon the death of an injured person. We have seen that section 38(1) of the *Trustee Act*[155] permits the estate of an

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[151] See *Vieczorek v. Piersma* (1987), 58 O.R. (2d) 583, 36 D.L.R. (4th) 136 (C.A.), where a husband and wife were injured in an automobile accident, sustaining fractures, with some loss of arm movement in the husband. A jury awarded damages to the husband for non-pecuniary loss of $54,600, and damages under the former *Family Law Reform Act*, R.S.O. 1980, c. 152, s. 60 (now s. 61 of the *Family Law Act, 1986*, *supra*, note 6) of $52,000 and $39,000 to the husband and wife, respectively. The Ontario Court of Appeal set the awards aside as extravagantly high, but held that it had no power to substitute its own assessment in the absence of consent of both parties.

[152] See the draft *Personal Injuries Compensation Act* proposed by the Commission (hereinafter referred to as "draft Compensation Act"), *infra*, Appendix 1, s. 15.

[153] *Ibid.*

[154] *Ibid.*, s. 16(1). See *supra*, note 151. Reform of the law on these lines has recently been recommended by the Law Reform Commission of British Columbia: *Report on Review of Civil Jury Awards*, LRC 75 (1984). See, also, the Memorandum of Dissent by Anthony F. Sheppard, in B.C. Report, *supra*, note 52, at 34.

[155] *Supra*, note 40, s. 38(1), reproduced *supra*, this ch., sec. 4.

injured person to recover damages for pain and suffering and, apparently, loss of amenities, but not loss of expectation of life. In addition, as we have indicated, section 61(2)(e) of the *Family Law Act, 1986*[156] provides that certain named relatives of the person injured or killed may recover "an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred".[157]

The Commission recognizes that there are certain anomalies respecting the theoretical basis of damages awarded to the estate of the deceased. If one accepts the functional approach to such awards, as adopted by the Supreme Court of Canada in the trilogy, then it seems difficult to justify an award where the victim is dead:[158] if, in other words, the sole purpose of awards for non-pecuniary loss is solace for the injured person, this purpose cannot be realized after death.[159] Some commentators have also expressed the view that "intangible losses are purely personal to the plaintiff", with "no loss at all to the estate".[160] Difficulties in this area have, therefore, led to calls for the abolition of awards for non-pecuniary loss in survival actions.[161]

The Commission believes, however, that the abolition of survival actions would give rise to significant problems. The Alberta Institute of Law Research and Reform, which recommended the abolition of damages for non-pecuniary loss (although it proposed compensation for "bereavement" in its place), acknowledged two such problems in this way:[162]

> We recognize that a consequence of this recommendation is that the plaintiff's recovery of damages ... will depend on his surviving to judgment, which is a matter of chance. We recognize also, that on the one hand, that state of the law may put pressure upon a plaintiff to sue early, and, that on the other, it may provide some inducement to a defendant to delay matters.

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156 *Supra*, note 6. See discussion *supra*, this ch., sec. 1.

157 The Commission's recommendations concerning such claims appear *supra*, ch. 2.

158 It has been acknowledged by one commentator that, since the Supreme Court of Canada's "functional theory [respecting the calculation of non-pecuniary loss] is inapplicable where the victim is dead", "if assessment is to continue as before, it must be under either the conceptual or personal approach": Cooper-Stephenson and Saunders, *supra*, note 38, at 397. These approaches are described *supra*, this ch., sec. 3(d).

159 Cooper-Stephenson and Saunders, *supra*, note 38, at 396-97, and Luntz, *supra*, note 38, para. 9.1.04, at 395.

160 Cooper-Stephenson and Saunders, *supra*, note 38, at 399.

161 See, for example, Alberta, Institute of Law Research and Reform, *Survival of Actions and Fatal Accidents Act Amendment*, *supra*, note 61, and *Survival of Actions Act*, *supra*, note 67.

162 *Supra*, note 61, at 15.

In the absence of survival actions, then, a victim's estate would not be entitled to benefit from an award for non-pecuniary loss where the victim died immediately before judgment, but would be able to do so where the victim died immediately after judgment.[163]

The Commission does, of course, recognize the difference between these two situations.[164] Where the plaintiff is alive at the time of judgment, damages for non-pecuniary loss are awarded in the belief that they will, in fact, provide some solace to her for the anticipated duration of her life. Clearly, as we have said, no such purpose can be realized where the victim dies before judgment.

However, we do not believe that this difference is significant enough to warrant the imposition of different legal consequences. We believe that it would be unjust and undesirable to make the recovery of damages for non-pecuniary loss dependent on what the Alberta Institute acknowledged to be a "chance" occurrence, namely, when the victim died.

Moreover, we are of the view that the argument that the present law countenances a "windfall" to the estate, and on that basis ought to be rejected, is not conclusive. Even assuming that the damages recoverable by the estate are properly characterized as a windfall, such good fortune is not unique to survival actions: whether the victim dies either immediately before or immediately after judgment, it will be the estate, not the victim, that benefits from an award.[165] Furthermore, in some cases the injured party may have expended funds prior to judgment in a manner consistent with the purpose of an award for non-pecuniary loss. Recovery by the estate in respect of such expenditure seems to us to be reasonable and hardly a windfall to the beneficiaries.[166]

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[163] Luntz, *supra*, note 38, para. 9.1.06, at 396-97.

[164] See Luntz, *ibid.*, at para. 9.1.06, at 397:

> Nevertheless, hard cases make bad law and if at the time when judgment is to be pronounced it is known that damages can no longer compensate, effect should be given to that knowledge. If the plaintiff, having obtained judgment for damages—including damages for non-pecuniary loss—then dies, a court on appeal would probably have to regard the claim as merged in the judgment and the death alone would not be a good ground for allowing the appeal (cf *Ryan v. Davies Bros Ltd.* (1921) 29 CLR 527); but if there are other grounds for allowing the appeal, the court should not shirk its duty because on the retrial or reassessment damages for non-pecuniary loss would be excluded.

[165] Of course, the estate may also benefit where the injured party never spends any of the damage award before he dies.

[166] Law Commission W.P., *supra*, note 79, para. 67, at 36 (see the passage quoted in the text following note 86, *supra*); Law Commission Report, *supra*, note 80, paras. 100-07, at 26-29; and Pearson Report, *supra*, note 11, paras. 442-44, at 100. In response, see Luntz, *supra*, note 38, para. 9.1.05, at 396:

On balance, therefore, we recommend that there should be no change in the law, under section 38(1) of the *Trustee Act*, respecting the entitlement of the estate of an injured person to recover damages for non-pecuniary loss.[167] We do recognize that, as a result of this proposal, estates would continue to be unable to recover damages for loss of expectation of life. Two main factors have influenced our decision. First, while perhaps justifiable on a conceptual level, the introduction of new legislation permitting an estate to recover damages for loss of expectation of life would add new and perhaps unanticipated complexities to an already controversial area of the law. We are mindful of the arguments marshalled specifically against such recovery in a survival action. Secondly, the Commission's other proposals in this Report are designed to provide, as much as possible, full compensation to an injured person and adequate protection to certain named dependants and others. In this sense, then, the provision of a new right to recover damages is unnecessary if its purpose is simply to secure better compensation.

(d) Mental Distress

A final matter relates to damages for mental distress, standing alone. We noted earlier that, in the absence of any physical injury, such distress may well be regarded as a species of personal injury.[168] However, tort law has been reluctant to compensate such losses unless they amount to actual bodily harm, although it has been said that the law "seems to be moving in the direction of enlarging liability".[169]

> The first reason is, it is believed, specious. Issues of liability, contributory negligence and quantum are usually too doubtful to allow victims to act confidently on such predictions. In any event, it cannot be assumed that such expenditure was motivated by the expectation of receiving damages for non-pecuniary, as opposed to economic, loss.

It is not at all clear why the alleged doubtfulness of the award and the motivation of the injured person are telling factors against the Law Commission's argument. Where the prejudgment expenditure was clearly to provide an amenity "lost" to the victim as a result of his injury, recoupment by the estate is, we believe, justifiable.

The Law Commission also stated that "relatives may have so acted in looking after him as to be not undeserving of the reward he may have intended to bestow upon them" (Law Commission W.P., *supra*, note 79, para. 67, at 36). Luntz responded as follows (*supra*, note 38, para. 9.1.05, at 396):

> With regard to the deserving relatives, it would be fortuitous if the ones to benefit from the award of damages to the estate for non-pecuniary loss were the ones who rendered the services, or if there was any correspondence between the value of the services and the amount received.

[167] See draft Compensation Act, s. 4(1), which begins: "In addition to damages otherwise recoverable in law". This statutory language would refer, *inter alia*, to s. 38(1) of the *Trustee Act*, *supra*, note 40.

[168] *Supra*, this ch., sec. 1. See, also, Waddams, *supra*, note 38, paras. 448 *et seq.*, at 263 *et seq.*

[169] *Ibid.*, para. 448, at 263.

In respect of negligence claims, it may be argued that any extension of the law in this area would have the effect of putting a premium on protestations of misery, lead to enormous difficulty in bringing about the settlement of claims, create heavy systemic costs, impose an enormous burden on those whose careless acts cause emotional distress, and drastically affect liability insurance premiums. In the case of intentional behaviour, on the other hand, other than that constituting an assault and battery or other nominate tort, it may be more justifiable to impose liability in the kind of case contemplated by the following provisions of the American Second Restatement of the Law of Torts:[170]

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

It may be thought anomalous, as Prosser once pointed out, to have "a rule which permitted recovery for a gesture that might frighten the plaintiff for a moment, and denied it for menacing words which kept him in terror of his life for a month".[171]

The issue of awarding damages for emotional distress associated with a breach of contract not producing a physical injury is one that has been explored by the courts. In recent years, there have been a number of contract cases that have imposed liability.[172] Some commentators have argued against the extension of damages in such cases,[173] and, in several instances, the scope of liability has been restricted in various ways.[174]

As in the torts context, the law of contract in this area exhibits some degree of uncertainty, but is also developing rapidly. Having regard to this state of affairs, there does not appear, at present, to be a convincing case for legislative intervention. Accordingly, the Commission recommends that the law respecting the award of damages for emotional distress alone should be allowed to develop on a case-by-case basis, without such intervention.

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[170] *Supra*, note 114, § 46(1).

[171] Prosser, *Handbook of the Law of Torts* (3d ed., 1964), at 44.

[172] See cases cited in Waddams, *The Law of Contracts* (2d ed., 1984), at 564-69.

[173] Rea, "Nonpecuniary Loss and Breach of Contract" (1982), 11 J. Legal Stud. 35. On the other hand, the developments were defended in Harris, Ogus, and Phillips, "Contract Remedies and the Consumer Surplus" (1979), 95 Law Q. Rev. 581.

[174] In *Brown v. Waterloo Regional Board of Police Commissioners*, *supra*, note 5, it was held that a claim for mental distress could not be attached to an unconnected breach of contract, and the Court stressed the need for the loss to have been within the contemplation of the parties at the time of the contract. In wrongful dismissal cases, only the *additional* distress, if any, caused by the failure to give proper notice is compensable.

RECOMMENDATIONS

The Commission makes the following recommendations:

*1. There should be no change in the present law and practice, as enunciated by the Supreme Court of Canada in the trilogy, respecting awards of damages for non-pecuniary loss.

2. (1) In the trial of an action for damages for personal injuries, the judge should be empowered to give guidance to the jury concerning the quantum of damages for non-pecuniary loss.

(2) Counsel should have the right to make submissions to the judge or the jury, as the case may be, on the quantum of damages, subject to the trial judge's overriding discretion to control proceedings of the court.

(3) An appellate court should have power, when setting aside a jury or court assessment of damages for non-pecuniary loss, to substitute its own assessment, instead of ordering a new trial, if it thinks this to be just in the circumstances.

3. There should be no change in the law, under section 38(1) of the *Trustee Act*, respecting the entitlement of the estate of an injured person to recover damages for non-pecuniary loss.

4. The law respecting the award of damages for emotional distress, standing alone, should be allowed to develop on a case-by-case basis, without legislative intervention.

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* Dr. H. Allan Leal, O.C., Q.C., Vice Chairman of the Commission, dissents from this recommendation: see *supra*, note 148.

CHAPTER 4

COST OF CARE

1. INTRODUCTION

As we noted earlier,[1] the method of assessing general damages in separate amounts received the *imprimatur* of the Supreme Court of Canada in *Andrews v. Grand & Toy Alberta Ltd.*[2] As a result, subsequent damage awards for personal injury have been divided, typically, into four separate heads of damage.[3] In recent cases involving serious personal injury the largest component in the assessment of general damages has been the award for cost of care. Such an award is intended to provide compensation for the future cost of medical and rehabilitative treatment judged necessary for the injured person by reason of the accident. "[T]he prime purpose of the court", it has been said, "is to assure that the terribly injured plaintiff should be adequately cared for during the rest of her life."[4]

The court's determination of the future care award involves a two-fold task. First, it must decide the kind of care to which the plaintiff is entitled. This will include, for example, a consideration of whether the plaintiff ought to be awarded the cost of home or institutional care, what special equipment ought to be paid for and whether rehabilitative or counselling services are warranted. The court must then decide how best to calculate the award in order to enable those goods and services to be provided during the entire period of disability. These are clearly determinations of two very different sorts. The first raises questions of broad social values; considerations of policy will undoubtedly affect whether a given level of compensation is considered adequate. The second requires resolution of financial and legal issues of a rather more concrete and technical nature.

It is this two stage process in the assessment of damages for future care that is addressed in this chapter. First we shall examine the standard of care, that is, the level of care appropriate for an injured tort victim. In the

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[1] *Supra*, ch. 1.

[2] [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452 (subsequent references are to [1978] 2 S.C.R.).

[3] The four heads of damage are: (1) special damages; (2) damages to compensate for lost future income; (3) damages to compensate for pain and suffering (non-pecuniary loss); and (4) damages to compensate for the cost of future medical and related care necessitated by the injury. See *supra*, ch. 1.

[4] *Arnold v. Teno*, [1978] 2 S.C.R. 287, at 320, 83 D.L.R. (3d) 609 (subsequent references are to [1978] 2 S.C.R.).

remaining sections we shall examine several of the quantum related issues that affect the calculation of the award.

2. STANDARD OF CARE

(a) INTRODUCTION

The term "standard of care" is applied to two unrelated concepts in the law of torts. As part of the analytic process of fixing liability, "standard of care" is a familiar stage in the duty-breach-damage scheme. A much less familiar use of the term is its application to the wholly distinct issue of future care for the successful plaintiff in a personal injury action. It is in this second sense that we use the term in this chapter.

Once liability has been determined, the primary function of the court, in a case of personal injury, is the assessment of the damages to which the plaintiff is entitled. Where an injury has had lasting effects that will require future medical, nursing, rehabilitative or attendant care, or the purchase of special equipment or prostheses, a damage award will include an amount to cover those costs. An award for future care will have as its objective the provision of enough money to enable the tort victim to be cared for throughout the entire period of her disability, or, where the disability is permanent, for the remainder of the victim's life.

In awarding compensation for the anticipated cost of future care, some sort of test is needed to determine the level or kind of care that should be assumed. There is a wide range of care and treatment options available in Canada for the sick, injured and disabled. For example, it is possible for a seriously injured person to be cared for either in an institution or at home, the latter option usually involving a much greater expense. Similarly, it is possible for a person who has lost a limb to use inexpensive and simple prostheses, or, alternatively, to use expensive and highly sophisticated devices. It is also possible for an injured person to purchase expensive equipment, such as a swimming pool for physiotherapy or a computer for home management, although it is equally possible for an injured person to manage without such equipment. It is the wide range of care and treatment options that exist between these extremes that renders it necessary for the court to determine the appropriate level of care to which the plaintiff is entitled.

(b) CURRENT LAW

The three cases decided by the Supreme Court of Canada in 1978[5] have been perceived generally as restrictive of the plaintiff's right to damages. An

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[5] *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, note 2; *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480 (subsequent references are to [1978] 2 S.C.R.); and *Arnold v. Teno*, *supra*, note 4.

important element in those cases was the ceiling placed on damages for non-pecuniary loss.[6] However, the Court made it very clear that the *quid pro quo* for the restriction on damages for non-pecuniary loss was a guarantee that proven pecuniary losses would be compensated in full. If the plaintiff was to lose the right to a large non-pecuniary award, full compensation for the plaintiff's actual costs had to be assured. By encouraging plaintiffs to prove every item of pecuniary loss, and by requiring courts to award compensation for those losses, the net effect of the cases seems to have been to enlarge, rather than to reduce, the overall size of damage awards.

The test for determining whether compensation should be based upon the more or the less expensive alternative has generally been stated simply as whether the expenses claimed are "reasonable". In *Andrews v. Grand & Toy Alberta Ltd.*, Dickson J., as he then was, explicitly rejected the argument that, in order to determine the appropriate standard of care for a person injured as a result of tortious conduct, the court ought to consider the standards adopted by society generally, as those standards are manifested by such statutory compensation schemes as Workers' Compensation.[7] Those programs, he suggested, aim merely at provision, rather than the full compensation that is the objective of the tort system. Mr. Justice Dickson stated:[8]

> The standard of care expected in our society in physical injury cases is an elusive concept. What a legislature sees fit to provide in the cases of veterans and in the cases of injured workers and the elderly is only of marginal assistance. The standard to be applied to [the injured plaintiff] is not merely 'provision', but 'compensation': *i.e.* what is the proper compensation for a person who would have been able to care for himself and live in a home environment if he had not been injured?

In the case of a totally or almost totally disabled plaintiff, the paramount issue is whether the victim should be cared for in an institution or a home care environment.[9] In *Andrews v. Grand & Toy Alberta Ltd.* Mr. Justice Dickson noted that the evidence given at trial supported the conclusion that the plaintiff would be benefited, not only psychologically and emotionally, but also medically, by a home care environment.[10] Given that evidence, the question became one of the principles underlying a future care

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[6] See, generally, *supra*, ch. 3.

[7] *Supra*, note 2, at 245-46.

[8] *Ibid.*, at 246.

[9] *Ibid.*, at 238. Since the 1978 trilogy of Supreme Court of Canada cases, *supra*, note 5, the term "home care" has come to have a recognized meaning as the provision of medical, nursing and/or professional supervisory service to an individual in a private residence, either on a 24 hour basis, or for more limited periods each day. "Institutional care", on the other hand, is the provision of the needed services in a residential institution, such as an auxiliary hospital. Institutional care costs are usually lower than those of home care.

[10] *Supra*, note 2, at 238.

award. The basic principle, the Court asserted, was the reasonable use of money to benefit the plaintiff's health:[11]

> In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury. Obviously, a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, *restitutio in integrum* is not possible. Money is a barren substitute for health and personal happiness, but to the extent within reason that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim.

In respect of entitlement to home care, therefore, the Court has indicated a definite predisposition in favour of the plaintiff. Where home care is sought by a plaintiff who would benefit therefrom medically, the Court will be reluctant to deny such care. Mr. Justice Dickson stated:[12]

> [B]efore denying a quadriplegic home care on the ground of 'unreasonable' cost something more is needed than the mere statement that the cost is unreasonable. There should be evidence which would lead any right-thinking person to say: 'That would be a squandering of money—no person in his right mind would make any such expenditure.' Alternatively, there should be evidence that proper care can be provided in the appropriate environment at a firm figure, less than that sought to be recovered by the plaintiff.

The Supreme Court of Canada's effective determination that home care is *prima facie* a reasonable expense has made home care the norm for a disabled plaintiff, provided that evidence is led to demonstrate that life at home would be to the plaintiff's benefit, and subject to the overall requirement that the costs to be incurred not be entirely disproportionate to the benefit to be gained. For example, in both *De Champlain v. Etobicoke General Hospital*[13] and *Schmidt v. Sharpe*[14] a severely disabled plaintiff was awarded the cost of future care in the home after appropriate expert evidence had been adduced.

An exception to the general willingness of the Ontario courts to fix awards for future care on the basis of home care is the recent decision in *Suitter v. Blake-Knox*.[15] In this case the combination of the plaintiff's severe physical disability, which Hollingworth J. found amounted to her virtual confinement to bed, and her considerable mental impairment, led the Court to reject a claim for home care. It is interesting to note that the judgment in

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[11] *Ibid.*, at 241.

[12] *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, *supra*, note 5, at 280-81.

[13] (1985), 34 C.C.L.T. 89 (Ont. H.C.J.).

[14] (1983), 27 C.C.L.T. 1 (Ont. H.C.J.).

[15] Unreported (August 1, 1985, Ont. H.C.J.).

Suitter makes no reference to expert testimony regarding the benefit to the plaintiff of living at home, but rather notes that Hollingworth J. himself "had the rare opportunity of seeing the patient and of watching her behaviour closely for a period of over one hour".[16] It is thus unclear whether the case, which is quite unusual in its award of institutional care only, is better seen as delineating a medical situation in which a plaintiff's entitlement will be restricted, or as a demonstration of the continuing necessity of expert evidence on the plaintiff's behalf. In favour of the first interpretation is the British Columbia case *Wipfli v. Britten*,[17] in which a child who had suffered severe and irreversible brain damage was awarded the cost of institutional care, capitalized to a lump sum of approximately $1.4 million. Together, *Suitter* and *Wipfli* suggest that an effectively insensate plaintiff may not be entitled to home care.

In the *Andrews* case, Dickson J. alluded to the possibility that some acceptable middle ground might exist between the extremes of home care and institutional care:[18]

> Is it reasonable for Andrews to ask for $4,135 per month for home care? Part of the difficulty of this case is that twenty-four hour orderly care was not directly challenged. Counsel never really engaged in consideration of whether, assuming home care, such care could be provided at lesser expense. Counsel wants the Court, rather, to choose between home care and auxiliary hospital care. There are unanimous findings below that home care is better. Although home care is expensive, auxiliary hospital care is so utterly unattractive and so utterly in conflict with the principle of proper compensation that this Court is offered no middle ground.

Due to the lack of suitable intermediate attendant care facilities, the Court, in this case, was confronted with choosing between two extreme alternatives. The choice at one end of the scale (institutional care) was so utterly unacceptable that, in effect, the Court was compelled to adopt, as the appropriate standard, the choice at the other end of the scale (home care). The indication in this case that some "middle ground" might have been the appropriate standard in the circumstances could have been anticipated to promote the evolution of a range of intermediate attendant care facilities. To the extent that such facilities have developed, and will continue to develop, the choices to be made by courts in the future will become less stark.[19]

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[16] *Ibid.*, at 72-73.

[17] (1982), 22 C.C.L.T. 104 (B.C.S.C.). Supplementary reasons were issued concerning the amount of damages to be awarded for the cost of future institutional care: (1983), 43 B.C.L.R. 1, 145 D.L.R. (3d) 80 (S.C.). While an appeal on this issue was allowed, a cross-appeal, on the home or institutional care issue, was dismissed: (1984), 56 B.C.L.R. 273, 13 D.L.R. (4th) 169 (C.A.). Leave to appeal to the Supreme Court of Canada was granted: (1985), 13 D.L.R. (4th) 169*n*.

[18] *Supra*, note 2, at 247-48.

[19] At present, two main programs of the Ontario Ministry of Community and Social Services make attendant care services available for the disabled. The first, started in

For example, in a recent judgment, the Manitoba Court of Appeal adopted the middle ground advocated by the defendant as being the appropriate standard of care in the circumstances, and it reduced the trial award accordingly. In *Watkins v. Olafson*[20] the plaintiff sought a future care award calculated on the basis of home care, with a full-time live-in attendant and a part-time home-maker. The defendants contended, and the appellate court agreed, that, under the circumstances, the plaintiff's demand to live in a private home was unreasonable. Two circumstances appeared to be of particular significance. First, during the nine and a quarter years between the date of the injury and the date of the trial, the plaintiff was required to spend in excess of six years in an institutional setting. While he did attempt to live independently during that period, he did so without success. It is possible, of course, that the plaintiff's lack of success in the private home care setting was a result of his inability to afford the necessary professional care, rather than an indication of the plaintiff's unsuitability for such care. Nevertheless, the Court concluded that, notwithstanding the plaintiff's desire to live in a private setting, he would likely require hospital care for a substantial portion of his future years. Secondly, the type of middle ground referred to by Dickson J., which was not available to the court when *Andrews* was decided, had become available to the Manitoba Court of Appeal. The government of Manitoba had established a number of residential apartment suites, known as "Fokus units", that were designed specifically for severely disabled individuals. Each building containing Fokus units had an attendant on call at all times, thus providing twenty-four hour care for the occupants. Since the attendant was available to provide care for several disabled persons within the building, substantial savings would be realized over the cost of a private attendant.

Huband J.A. speculated that, despite the plaintiff's wishes to the contrary, accommodation in a Fokus unit might well prove more satisfactory for the plaintiff than living in his own private dwelling.[21] After noting that the function of the court is to compensate the plaintiff according to some reasonable standard, Mr. Justice Huband concluded that "[i]n my view, a Fokus unit would seem to constitute that reasonable standard for a

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1979, is the Support Service Living Unit Program (also referred to as the "Attendant Care Program"), which, primarily through a variety of transfer payment arrangements, makes attendant care available at specified locations. Typically, services are provided in residential buildings, designed or modified to accommodate a number of disabled tenants. Attendant care is made available on a 24 hour a day basis. Currently, there are 56 such buildings in Ontario, providing services for approximately 700 clients.

The second program, the Attendant Care Outreach Program, initiated in 1984, was intended specifically to fill at least part of the gap between home care and institutional care. Under this program, a variety of community agencies provide services for the disabled, on a visitation basis, in the individual's own home. However, services are limited to a maximum of 90 hours per month. At present, approximately 350 clients receive services under this program.

[20] [1987] 5 W.W.R. 193 (Man. C.A.).

[21] *Ibid.*, at 214.

person with the plaintiff's disabilities".[22] Monnin C.J.M. agreed that a Fokus unit would be preferable to a private home in this case and that such accommodation represented the appropriate standard of care in the circumstances.[23] The Chief Justice also questioned "whether courts will in future be able to provide each and every victim with a separate residential property".[24]

The award of future care costs calculated on the basis of a Fokus unit contrasts markedly with the recent decision of Osler J. in *MacDonald v. Travelers Indemnity Co. of Can*.[25] In this case, a young woman was rendered almost totally paralyzed and profoundly brain-damaged as a result of a head injury suffered in an automobile accident. As a consequence of her injuries she was dependent upon others for virtually every aspect of her physical care. There was substantial medical evidence that the level of institutional care received by the plaintiff, prior to her return to her family home, was entirely inadequate to her needs, and that the plaintiff's life span would be shortened if she were returned to a chronic care facility. The medical evidence established that the plaintiff required intensive and continuous nursing care. On such evidence, Mr. Justice Osler had no hesitation in accepting home care as being reasonably necessary for the plaintiff. Care was to be provided for the plaintiff on a twenty-four hour basis, seven days per week. Such care was to include the services of a registered nurse for one of the three daily shifts, and a registered nursing assistant for each of the two remaining shifts. Provision was also made for the services of two health care aides per day during the week (one for eight hours and one for four hours), and one health care aide for four hours per day on the weekend. The total cost of this standard of nursing care was calculated to be $176,553.52 per

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[22] *Ibid.*, at 215.

[23] *Ibid.*, at 203.

[24] *Ibid.*, at 201-02.

[25] (1987), 60 O.R. (2d) 385 (H.C.J.). The plaintiff was a passenger in an automobile involved in an accident in the State of Michigan. The case concerned, primarily, the quantification of the plaintiff's damages in respect of the cost of future care. The defendant company, which was the plaintiff's father's insurer, had brought an earlier action to determine the extent of its liability. It was held in that action that the law of Michigan applied, and that the defendant was primarily liable to pay no-fault benefits to the plaintiff, on the scale of benefits provided under the law of Michigan (*Travelers Canada v. MacDonald* (1984), 48 O.R. (2d) 714 (C.A.)). The Michigan Insurance Code of 1956, Mich. Comp. Laws Ann. § 500.3107, provides, in part, as follows:

> § 500.3107. Personal protection insurance benefits are payable for the following:
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> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation....

Section 500.3110(4) provides that "personal protection insurance benefits payable for accidental bodily injury accrue not when the injury occurs but as the allowable expense...is incurred". Finally, § 500.3142(1) provides that "personal protection insurance benefits are payable as loss accrues".

year. Since the defendant's liability, as principal no-fault insurer, was to pay the plaintiff's reasonable medical and rehabilitation expenses, during her lifetime, on the scale provided under the law of the State of Michigan, the total liability of the defendant was not quantified. However, since the plaintiff was only twenty-eight years old, and had a relatively normal life expectancy, the future nursing care costs alone could well have a present value of nearly $5,000,000.[26]

Another approach to the standard of care issue is the "staged care" concept found in the recent decision of the Ontario Court of Appeal in *McErlean v. Sarel*.[27] In that case the calculation of damages, at trial, was based on the assumption that, for the remainder of his life, the plaintiff would be cared for in the home. The Court of Appeal rejected that assumption, referring to a variety of possibilities, including the future inability of the respondent's parents to provide care for the respondent. The Court concluded that, having regard to the respondent's mother's age and health, damages should have been awarded on the basis of home care, for the first twenty years, and on the basis of institutional care, for the balance of the respondent's life.[28]

For a disabled plaintiff, life in a private residence may entail costs beyond those of medical and nursing care. For example, housekeeping costs will be incurred if a plaintiff, who lives alone, is incapable of contributing significantly to the upkeep of his home or the preparation of his meals. Additional costs stem from the typical unsuitability of ordinary houses and apartments for use by the disabled. Extensive modifications are often necessary and, not infrequently, a more appropriate home must be purchased or leased. In general, courts in Ontario and elsewhere in Canada have recognized the need for special housing that arises from an award of home care. In order to provide greater safety of movement for a disabled plaintiff, the additional cost of a new house has been included in the calculation of future care costs.[29] In another case a $40,000 award to upgrade a plaintiff's house was upheld on appeal, despite the fact that the resulting standard of housing would exceed that of the surrounding community.[30]

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[26] Assuming that the annual nursing care cost of $176,553.52 would continue for approximately 40 years (since the plaintiff was only 28 years old and had a relatively normal life expectancy) the defendant's total cost over the 40 year period would be approximately $7,000,000. The present value of this sum is approximately $5,000,000.

[27] Unreported (September 29, 1987, Ont. C.A.).

[28] The factors considered by the Court were said to be contingencies, the deduction for which could have been effected either by adopting the "staged care" approach, or by deducting a percentage of the award. The former approach was preferred in the circumstances. *Ibid.*, at 58-59. Contingencies are discussed *infra*, ch. 8, sec. 1.

[29] See, for example, *Reynard v. Carr* (1983), 50 B.C.L.R. 166, at 200, 30 C.C.L.T. 42 (S.C.), appeal allowed, in part, on other grounds, (1986), 10 B.C.L.R. (2d) 121 (C.A.).

[30] *McLeod v. Palardy* (1981), 10 Man. R. (2d) 181, 124 D.L.R. (3d) 506 (C.A.).

Unlike the issue of home or institutional care, the compensability of home modifications was not addressed in a clear manner in the trilogy. An award to compensate for necessary changes in housing was allowed in only one of the two trilogy cases in which the issue arose. In *Thornton*, the Supreme Court of Canada restored the trial level award of damages, which was based upon an expert's recommendation that $45,000 be awarded for the cost of a home. In *Andrews*, on the other hand, the trial court rejected an equivalent claim for the purchase price of a house in the future care award. While the trial judge referred to the "physical adjustments" necessary to allow the plaintiff to live at home, he denied that the defendant was obliged to pay for a house.[31] Although this aspect of the trial decision would appear to permit compensation, at least for the cost of modifying an apartment, no such allowance was made either by the trial judge, or by the Supreme Court when it restored home care as the basis for calculating the award. Since there is no indication that the issue arose in *Arnold v. Teno*, that case does not cast a deciding vote, and the trilogy thus remains equivocal on the question of the special housing expenses incurred by a disabled individual.

It is possible to interpret the Supreme Court's treatment of this issue as less a lapse in fidelity to principle than a distinction rooted in the trial records. In contrasting the apparent uncertainty on home modification to the consistency shown by the trilogy on the issue of home or institutional care, it may be pointed out that, with respect to both questions, the Supreme Court was restoring awards originally made at trial, and that the trial courts in *Andrews* and *Thornton* were presented with different evidence, making appropriate their differing conclusions on the home modification issue. The Supreme Court, on this view, implicitly endorsed the principle of compensation for home alterations in its *Thornton* decision, while in *Andrews* the Court simply respected whatever evidentiary deficiencies had led the trial judge not to make such an award.

In any event, it is clear that post-trilogy decisions, on the whole, have strongly endorsed the idea that necessary structural changes or home purchases are compensable. Thus, in a 1984 British Columbia case, a defendant who sought to reduce the award made in this category did so by arguing, not that the plaintiff's claim for a house was unreasonable, but rather that living in an apartment or condominium would be to the plaintiff's advantage, since he would be more likely, in such a setting, to build a healthy social life.[32]

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[31] *Andrews v. Grand & Toy Alberta Ltd.* (1974), 54 D.L.R. (3d) 85, at 113-14, [1974] 5 W.W.R. 675 (Alta. S.C., T.D.).

[32] *Bissky v. Trottier* (1984), 54 B.C.L.R. 288 (S.C.), at 297-98. Interestingly, a similar argument was advanced by the defence in *Andrews*, at the trial level. This contention was rejected by Macdonald J., who noted that the defendant had failed to lead evidence as to the availability of the proposed alternative accommodation.

A person who has suffered significant impairment of normal physical functioning may benefit from the use of special equipment. Items for which Ontario courts have made awards in this category range from an $80 electric potato peeler[33] to relatively sophisticated and expensive prosthetic devices. More typical articles include wheelchairs, vans with hand controls, and special furniture. In many cases, although the items are not themselves exceptionally expensive, their aggregate cost can account for a sizeable proportion of the total award. Further, because certain equipment tends to have a rather short useable life, an award for such equipment must include a replacement cost.

It is with respect to this category that recent judgments tend to display the greatest variation in the treatment given the standard of care dimension of future care awards. In this connection, the principle, once again, is that "reasonable" needs will be met. While the trilogy provided a somewhat more concrete guide for deciding between home and institutional care, no such guide exists in respect of special equipment. Trial judges will assess the reasonableness of each item for which a claim is advanced, usually assisted by a report prepared by an expert witness.

There would appear to be some inconsistency in the judicial recognition of claims for specific items of equipment. For example, a computer was deemed a reasonable expense in *De Champlain*,[34] but in the *Schmidt* case, despite a recommendation by a psychologist from the Ontario Crippled Children's Centre, it was not.[35] Of course, allowing a computer to one severely disabled plaintiff, but not to another, is not necessarily evidence of any real inconsistency, provided the same approach to principles of entitlement and to expert evidence is taken in both cases. It would appear, however, that Canadian courts employ a variety of approaches in this area. For example, *Houle v. City of Calgary*[36] and *Giannone v. Weinberg*[37] both involved young children who had lost a forearm. In the former case, only half of the twelve year old plaintiff's claim of $138,000 for prostheses was allowed. Medhurst J. explained the reduction of the award by referring to the uncertainty regarding the availability of governmental and private funding, the plaintiff's possible unwillingness to use advanced prostheses, and future technological development.[38] Thus, the plaintiff in the former

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[33] *De Champlain v. Etobicoke General Hospital*, *supra*, note 13, at 100.

[34] *Ibid.*

[35] *Schmidt v. Sharpe*, *supra*, note 14.

[36] (1983), 44 A.R. 271, 26 Alta. L.R. (2d) 34 (Q.B.) (subsequent references are to 44 A.R.). On appeal, damages for loss of future earnings were reduced; a cross-appeal as to damages, including cost of future care, was dismissed: (1985), 60 A.R. 366, 20 D.L.R. (4th) 15 (C.A.). Leave to appeal to the Supreme Court of Canada was refused: (1985), 20 D.L.R. (4th) 15*n*.

[37] (1986), 37 C.C.L.T. 52 (Ont. H.C.J.).

[38] *Supra*, note 36, at 287.

case recovered $69,000 for the anticipated cost of prostheses. The plaintiff in the latter case, however, recovered $953,867 for the same item, that is, the anticipated cost of prostheses. The difference is quite dramatic, although it should be noted that the *Giannone* case is under appeal.

In this section we have identified three components of the standard of care issue: the often logically prior question of home care; and, as ancillary questions, the inclusion in the award of funds to enable home modifications and the purchase of special equipment. Of course, other components might be included in the future care head of damage. For example, there might be future medical or hospital expenses; the provincial health care scheme, however, will normally be subrogated to this portion of the cost of care award. There might also be significant medication costs.[39] The court's decisions on all of these issues, taken together, will comprise its evaluation of the standard of care that the future care award is designed to provide.

From the above discussion, it would appear that a successful plaintiff in an Ontario case involving personal injury serious enough to require long-term care will likely receive an award for home care, unless the plaintiff is mentally handicapped to such an extent that home care would be of little benefit. The trilogy decisions in this regard are clear, and their principles have been consistently followed: where the evidence establishes that the plaintiff's health—mental, emotional and/or physical—will benefit from home care, the expense entailed will ordinarily be found to be reasonable.

The cost of necessary modifications to the plaintiff's home, or even the purchase of a new one, is also likely to be included in the award, despite the lack in the trilogy of an unequivocal endorsement of the compensability of home alterations. The courts' treatment of the plaintiff's needs for special equipment is somewhat less clear, particularly where an item is very expensive or only recently available. Expert evidence that the device will aid the plaintiff is necessary, but may be insufficient to induce the court to accept the item as a reasonable claim.

(c) Conclusions

The two concerns that have been expressed about this area of the law are: (1) cost; and (2) inconsistency. Taking first the question of cost, it is obvious that the cost of damage awards is spread over a wide section of the public, directly through the cost of liability insurance premiums, and indirectly through the cost of goods and services generally. It has also become increasingly obvious that infinite costs cannot be absorbed. On the other hand, the mere magnitude of the cost of compensation is not, in itself, a sufficient reason to reduce the size of damage awards. All actual pecuniary

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[39] *Henrikson v. Parke* (1981), 29 A.R. 431 (Q.B.), at 448.

losses suffered by the plaintiff must be borne, inevitably, by one or the other of the parties. If the defendant is not required to bear the cost of those losses, then, of necessity, the plaintiff must do so.[40] The magnitude of a loss can be no justification for undercompensation.

In *Thornton* it was said that a quadriplegic should only be denied home care if a right-thinking person would say that such a provision would amount to a squandering of money.[41] Although this test appears to be very favourable from the plaintiff's point of view,[42] the context shows that Dickson J. did not intend to depart from the general test of "reasonableness". In the *Andrews* case, which, it will be recalled, was decided at the same time as *Thornton*, Dickson J. said: "I agree that a plaintiff must be reasonable in making a claim."[43] Further, in *Andrews*, Dickson J. said: "In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury."[44]

"Reasonableness", however, is a notion capable of different interpretations, and, in the absence of a single, orthodox interpretation, particularly with respect to special equipment costs, the requirement of reasonableness has left a great deal of room for judicial discretion. The result is some inconsistency in the standards of care awarded to plaintiffs, and potential inadequacy in some instances. One of the objects of the civil litigation system must be to achieve justice, not only as between plaintiff and defendant, but also as between plaintiff and plaintiff. Indeed, consistency was one of the principal reasons for the $100,000 limit imposed by the Supreme Court of Canada in the 1978 trilogy of cases.[45] Although *Houle v. City of Calgary*[46] and *Giannone v. Weinberg*[47] may be exceptional cases, discrepancies such as exist between them are disturbing from the point of view of both fairness and predictability.

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[40] Of course, in the event that the plaintiff is unable financially to bear the full cost of his losses, to some extent, through a variety of social welfare programs, they may be borne by the state.

[41] *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, *supra*, note 5, at 280-81.

[42] See *supra*, text accompanying note 12.

[43] *Supra*, note 2, at 240.

[44] *Ibid.*, at 241.

[45] *Supra*, note 5.

[46] *Supra*, note 36.

[47] *Supra*, note 37.

Notwithstanding the apparent lack of consistency between judicial standards for the awards of home care as compared to awards for special equipment, we have concluded that it would be advisable to permit the courts to evolve their own standards for what constitutes reasonable care. We are confident that, over time, the identified inconsistency will diminish.

The present law is that the plaintiff is entitled to compensation if she establishes that her claim is reasonable. This, in our view, is the appropriate test. We do not believe it would be helpful to attempt to evolve some test of reasonableness to assist the courts in assessing future care awards. Most impartial observers would concede that, in general, the courts have acted responsibly in the assessment of damages. Moreover, it is difficult to perceive how some generalized standard would be helpful to the courts. The circumstances of such claims are so varied that we do not think that any statutory refinement is likely to improve upon the existing law on this question. Further, we believe that the general test of "reasonableness" is the appropriate test to ensure that the courts are able to respond to new developments in the provision of health care services. As the health care system continues to evolve, and the range of intermediate care facilities continues to expand, the test of "reasonableness" is sufficiently flexible to enable the courts to accommodate alternatives that did not exist when *Andrews* was decided. Accordingly, there appears to us to be no need for legislation designed to determine the standard of care.

3. INCOME TAX AND GROSS-UP

(a) Introduction

We have already noted[48] that the purpose of the cost of care award is to put the injured plaintiff in the position she would have been in had the accident not occurred. Traditionally, the courts have sought to achieve this purpose by awarding a lump sum amount which, together with the proceeds of its investment, is intended to provide the plaintiff with sufficient funds to meet the ongoing costs of future care during the entire period of disability. Given the purpose of the award, and given the current realities of income taxation, the question we now turn to address is whether, and to what extent, an additional amount ought to be awarded in order to account for the taxation of the income generated by investment of the lump sum award. The need for this "gross-up" of the future care award, to allow for the incidence of taxation, has been described as follows:[49]

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[48] See *supra*, text accompanying note 11.

[49] *De Champlain v. Etobicoke General Hospital*, *supra*, note 13, at 101.

> The income on the capital sum awarded to produce the number of dollars assessed for future care cost will be eroded by income tax. It is, therefore, necessary to 'gross up' the capital sum to offset the ravages of income tax and ensure that the sum of $40,000 per year [the projected annual cost of care] will be available to pay those future care costs.

Thus, if the purpose of the future care award is to be achieved, and full compensation awarded, it is essential that an amount be included to compensate the plaintiff for any income tax that must be paid on the income derived from investment of the award.

As we shall discuss more fully below, the magnitude of the gross-up required for a future care award is reduced substantially by a number of factors. For example, no allowance is appropriate in respect of that portion of a future care award to which a provincial health plan is subrogated.[50] Further, account must be taken of the deduction permitted by the *Income Tax Act*[51] for medical expenses,[52] and for the tax free status of awards for plaintiffs under the age of twenty-one.[53] Moreover, no allowance is appropriate in respect of basic living expenses, if such expenses are included in the cost of care award.

Even if these mitigating factors are taken into account, however, there may still be some adverse effect from taxation for which the plaintiff ought to be compensated. This derives principally from two factors. First, not all costs recognized by the courts as allowable costs of future care qualify for the medical expense deduction under the *Income Tax Act*. Secondly, even if all future care costs were deductible in calculating taxable income, tax would still be payable on a portion of the investment income in the early years, while, in the later years, the medical expense deduction would be wasted since insufficient income would be available from which to make the deduction.[54] This is a consequence of the fact that, in times of high inflation and high interest rates, a "self-extinguishing" fund must be invested such that, in the early years, a portion of the income generated by the future care award may be reinvested. This capitalized income is intended to ensure that the rising cost of care can be met, in later years, without exhausting the fund before the end of the period of disability. As a result, however, investment income might exceed the cost of care in the early years, resulting in overtaxation, while the cost of care might exceed investment income in the later years.

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[50] Since the plaintiff would not receive this portion of the award, no investment income will be generated thereby that would be taxable in the plaintiff's hands.

[51] R.S.C. 1952, c. 148, as substantially re-enacted by S.C. 1970-71-72, c. 63 (subsequent references are to sections of the 1970-71-72 statute, as amended).

[52] *Ibid.*, s. 110(1)(c).

[53] *Ibid.*, s. 81(1)(g.1).

[54] The medical expense deduction, of course, would not be wasted in later years if the plaintiff has sufficient additional income from other sources.

(b) CURRENT LAW

(i) Entitlement

In the 1978 Supreme Court of Canada trilogy[55] no gross-up was allowed for the tax that might have to be paid on the investment income derived from the lump sum cost of care award. In rejecting the plaintiff's claim for such an allowance in the *Andrews* case,[56] Mr. Justice Dickson drew attention to the fact that the impact of taxation on the income generated by the award would be mitigated by the deduction for medical expenses contained in section 110(1)(c) of the *Income Tax Act*.[57] He also referred to the possibility that Parliament might amend the *Income Tax Act*. He said:[58]

> The exact tax burden is extremely difficult to predict, as the rate and coverage of taxes swing with the political winds. What concerns us here is whether some allowance must be made to adjust the amount assessed for future care in light of the reduction from taxation. No such allowance was made by the Courts below. Elaborate calculations were provided by the appellant to give an illusion of accuracy to this aspect of the wholly speculative projection of future costs. Because of the provision made in the *Income Tax Act* and because of the position taken in the Alberta Courts, I would make no allowance for that item. The Legislature might well consider a more generous income tax treatment of cases where a fund is established by judicial decision and the sole purpose of the fund is to provide treatment or care of an accident victim.

An allowance for income tax was refused for the same reasons in *Thornton*,[59] and for similar reasons in *Arnold v. Teno*.[60]

In some provinces the above-quoted passage has been interpreted to mean that, as a matter of law, no award may be made to account for the incidence of taxation.[61] However, in *Fenn v. City of Peterborough*[62] the Ontario Court of Appeal denied that the Supreme Court of Canada had established a rule of law forbidding a court to gross-up the future care award to compensate the plaintiff for income taxes payable on the investment income derived from the award. The Court concluded that the claims for

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[55] *Supra*, note 5.

[56] *Supra*, note 2, at 259-60.

[57] *Supra*, note 51.

[58] *Supra*, note 2, at 260.

[59] *Supra*, note 5, at 284-85.

[60] *Supra*, note 4, at 324-25.

[61] See, for example, *Scarff v. Wilson* (1986), 10 B.C.L.R. (2d) 273, 39 C.C.L.T. 20 (S.C.).

[62] (1979), 25 O.R. (2d) 399, 104 D.L.R. (3d) 174 (subsequent references are to 25 O.R. (2d)).

future tax liability had failed in the Supreme Court of Canada simply for lack of evidence.[63] For the same reason the claim also failed in *Fenn v. City of Peterborough*.[64]

Thus, in Ontario, it would appear that an award for income tax is to be made, provided it is supported by the evidence.[65] Such evidence is routinely adduced, and such awards are routinely made, varying in amount from zero percent, to approximately one hundred and fifty-three percent, although thirty-five percent appears to represent a relatively common gross-up amount.[66]

The need for an allowance for income tax, to ensure full compensation, is due primarily, in our view, to the two factors we identified above. As we explained, there are certain costs awarded for future care that are not deductible as medical expenses under the *Income Tax Act*. Moreover, there

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[63] *Ibid.*, at 456.

[64] *Ibid.*

[65] The Ontario Court of Appeal has confirmed this interpretation in the recent decision in *McErlean v. Sarel*, *supra*, note 27, at 64.

[66] For example, in *Turner v. MacDonell*, unreported (October 5, 1984, Ont. H.C.J.) Rosenberg J. considered a gross-up on the future care award, but refused to grant it because the injured person had received a tax subsidy by having his past and future loss of income awarded without deduction for taxes. Rosenberg J. believed that the benefit of that tax subsidy on lost income would exceed the tax liability that would accrue from the investment of the future care award. In *Schmidt v. Sharpe*, *supra*, note 14, at 43, Gray J., accepted that there should be a gross-up of the future care fund. However, while the plaintiff claimed 100%, Gray J. allowed only 35%. Mr. Justice Gray did not indicate whether he was unconvinced by the evidence about the rate of inflation or whether he thought a larger portion of the award would qualify for the medical expense deduction. In *Nielsen v. Kaufmann* (1984), 28 C.C.L.T. 54 (Ont. H.C.J.), a fatal accident case, a gross-up amount of $140,704 (that is, gross-up at a rate of approximately 63%) was calculated on a future income fund of $222,237.75. The actual amount awarded in respect of gross-up, however, was reduced by 25% to $105,528. Holland J. applied "a contingency reduction of 25 per cent to represent the reduction in the tax that may be affected by the investment of at least part of the sum in tax-sheltered securities and by the possibility that the Government of Canada in times of inflation in the future may protect or exempt from tax certain other classes of securities, such as municipal debentures, as has been done in other countries" (*ibid.*, at 63-64). Although the assessment of damages was varied on appeal, the gross-up rate and the 25% contingency deduction applied by the trial judge were retained ((1986), 54 O.R. (2d) 188, 26 D.L.R. (4th) 21 (C.A.) (subsequent references are to 54 O.R. (2d))). Finally, in *McErlean v. Sarel* (1985), 32 C.C.L.T. 199 (Ont. H.C.J.) a future care award of $2,054,366 was supplemented by an income tax gross-up of $3,136,324, that is, a gross-up of approximately 153% of the cost of care award. On appeal, however, the Ontario Court of Appeal concluded that the trial judge had erred insofar as he "accepted all of the respondent's expert evidence and, more significantly, its ultimate results, uncritically" (*supra*, note 27, at 71). Since the trial judge had failed to consider a variety of factors that contributed to the speculative and uncertain nature of future tax liability, and since, in the opinion of the Court, the award was "inordinately high", the Court of Appeal would have reduced the award by one-half. As the Court would also have reduced the future care award to $1,749,707, it concluded that the appropriate gross-up amount would have been $845,029, that is, approximately 50% of the cost of care award (*ibid.*, at 71-72).

is the fact that, in inflationary times, the future care fund is overtaxed because of the high income necessary in the early years to produce the required series of receipts in the later years. As we shall discuss below, the most desirable solution may well be an amendment of the income tax rules, but, so long as the need for gross-up continues to exist, the courts, in our opinion, are on sound ground in taking it into account. An award of damages calculated to compensate the plaintiff for the cost of care only, and not also for the tax payable on income generated by the award, would undercompensate the plaintiff. We would note that a recent English case,[67] although not referring to the Ontario cases, has held that it is a proper factor to be taken into account on ordinary compensatory principles.

(ii) Calculation: Influential Factors

In order to quantify accurately the appropriate allowance for income tax, it is necessary to calculate the size of the fund that would be required to generate sufficient income to pay future income taxes, in addition to the anticipated future care costs. Unfortunately, the calculation of the required increase is not simply a mechanical or arithmetical task. It depends upon a number of assumptions on issues about which wide divergences of opinion are to be found among experts. Moreover, a very slight variation in one of the assumptions can lead to an extremely large variation in the final figure. Not unexpectedly, experts are to be found who will make all assumptions in a manner favourable to the plaintiff, while other experts are to be found who will do the same in favour of the defendant. In the result, the trial judge will often be in the position of having to choose between substantially different figures.

Neither judges nor juries can be expected to be expert in accounting or actuarial science. The explanations of the precise methods of calculating these amounts are extremely complex. Moreover, judges have not always indicated, in their reasons, how the calculations have been made. In *Giannone v. Weinberg*,[68] for example, Fitzpatrick J. said simply, in a section dealing largely with a different question, and headed "Future Inflation":[69]

> I find that the figure which should be used for future inflation is 8 1/2 per cent and, using that figure and the other figures found, it will require $1,615,000 to provide for the income taxes which the plaintiff Antonella Giannone will have to pay.

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[67] The case for a supplement to recognize the impact of income tax was accepted by the English Court of Appeal in *Thomas v. Wignall*, [1987] 2 W.L.R. 930, [1987] 1 All E.R. 1185 (subsequent reference is to [1987] 2 W.L.R.). The supplement approved amounted to approximately 15%, which the Court described as "quite a generous adjustment, but not an excessive one" (*ibid.*, at 937).

[68] *Supra*, note 37.

[69] *Ibid.*, at 55.

One of the express purposes of the Supreme Court of Canada in the 1978 cases was consistency and rationality. Dickson J. said:[70]

> The method of assessing general damages in separate amounts, as has been done in this case, in my opinion, is a sound one. It is the only way in which any meaningful review of the award is possible on appeal and the only way of affording reasonable guidance in future cases. Equally important, it discloses to the litigants and their advisers the components of the overall award, assuring them thereby that each of the various heads of damage going to make up the claim has been given thoughtful consideration.

These objectives are jeopardized if the court does not explain how the figures have been calculated. A defendant may reasonably ask for an assurance that the gross-up is being applied only to the appropriate portion of the future care award[71] and that the assumptions underlying the court's calculation of the gross-up are reasonable. The factors that influence the determination of the appropriate gross-up, about which the court must make its assumptions, and to which we now turn, are the following: the rate of future inflation, the future impact of income taxation, the nature of the investments to be made with the capital sum, the rate of withdrawal or "draw-down", and the amount of other income of the plaintiff. Although substantial reforms to the income tax system have been proposed,[72] at present they remain merely proposals. Accordingly, we shall consider only the current law in the following discussion.

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[70] *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, note 2, at 235-36.

[71] As we noted earlier, *supra*, this ch., sec. 3(a), no gross-up is appropriate in respect of that portion of a future care award to which a provincial health plan is subrogated, nor is an allowance appropriate in respect of basic living expenses, if included in the cost of care award. Moreover, allowance must be made for the tax free status of the fund until the plaintiff is 21 and account must be taken of the tax deduction for medical expenses.

[72] Substantial reform of the income tax system was proposed by the Minister of Finance, in the House of Commons, on June 18, 1987. Numerous changes contemplated in the Minister's White Paper would have a direct effect upon the reasonableness of the gross-up assumptions. For example, income tax rates would be lowered and the number of tax brackets would be reduced from 10 to 3. The lifetime exemption for capital gains would be limited to its current level of $100,000 and the proportion of capital gains to be included in income would be increased from one-half to two-thirds in 1988 and to three-quarters in 1990. The dividend tax credit would be reduced. The $1,000 interest and dividend income deduction would be eliminated. However, the proposal that would have the most dramatic effect upon the gross-up calculation is the proposal to convert the deduction for medical expenses in excess of 3% of income into a credit of 17% of medical expenses in excess of 3% of income. Conversion of the medical expense deduction into a tax credit at the rate of 17% will have no adverse tax consequences for individuals with taxable income below $27,500, since their tax rate would be 17%. However, it would reduce the tax savings for individuals with taxable income in excess of $27,500, and, accordingly, for those individuals, a greater gross-up amount would be required. See Canada, Department of Finance, *The White Paper[:] Tax Reform 1987* (1987), at 25-36.

a. Rate of Future Inflation

As the *Income Tax Act*[73] taxes nominal income rather than real income,[74] the rate of future inflation is a major factor in determining the gross-up. That is, the *real* rate of taxation increases with inflation because taxes are based on nominal interest, not real interest. Thus, the higher the rate of inflation, the higher will be the interest income, and the higher will be the rate of taxation. Of course, this, in turn, will require a higher gross-up amount.

The rate of inflation assumed in the gross-up calculation has been the subject of debate in the recent larger tort cases in Ontario. Two approaches have emerged. One approach applies a forecast of inflation based on the current inflation rate, that is, a macroeconomic forecast.[75] The other approach subtracts 2.5 percent (the presumed real rate of interest) from the current nominal interest rates for long-term bonds to arrive at a forecast of the rate of inflation.[76] Of course, the latter approach is only as correct as the 2.5 percent discount rate.[77]

A relatively small difference in the forecast of the rate of inflation can lead to a relatively large difference in the gross-up. Moreover, it would appear that, in each case, the trial judge must determine the future rate of inflation, based upon the evidence presented. In *Davies v. Robertson*[78] the Ontario Court of Appeal stated:[79]

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[73] *Supra*, note 51.

[74] Nominal (observed) interest rates reflect two components: (1) the rate of expected price inflation; and (2) a "real" rate of return. That is, some of the return on an investment is simply compensation for the declining value of the principal in terms of purchasing power. Nominal interest rates will equal, approximately, the expected real rate of return plus the expected rate of inflation. For example, if interest rates are 10% and inflation is predicted to be 7%, the expected real rate of return is about 3%.

[75] See, for example, *De Champlain v. Etobicoke General Hospital*, *supra*, note 13.

[76] See, for example, *Giannone v. Weinberg*, *supra*, note 37, at 54-55. The theory underlying this approach is discussed, briefly, *supra*, note 74.

[77] In Rea, "Inflation, Taxation and Damage Assessment" (1980), 58 Can. B. Rev. 280, the author suggests that, rather than attempting to forecast the rate of inflation for the purpose of calculating future losses, and thereafter determining the present value by discounting the anticipated losses using the nominal interest rate, it would be easier to make all predictions of future losses in terms of current prices, thereby ignoring inflation, and to then determine the present value by discounting the losses using the real rate of interest.

Rule 53.09 of the Rules of Civil Procedure, O. Reg. 560/84, now provides as follows:

> 53.09 The discount rate to be used in determining the amount of an award in respect of future pecuniary damages, to the extent that it reflects the difference between estimated investment and price inflation rates, is 2 1/2 per cent per year.

[78] (1984), 5 O.A.C. 393.

[79] *Ibid.*, at 398.

> Once again the rate set for the calculation of the gross up figure will depend on the evidence adduced and the findings made in each case. It will be determined primarily by the rate of future inflation found to be appropriate by the trial judge....The rate for determining the gross up figure cannot be arbitrarily set by the trial judge. It must be based upon the evidence adduced and the findings made.

In this case, on the evidence, the trial judge estimated the future inflation rate to be ten percent. Based upon that inflation rate the actuary determined that the gross-up figure should have been 53.2 percent. The trial judge, however, applied the lower rate of twenty-five percent. The Court of Appeal concluded that, since the trial judge found the future inflation rate to be ten percent, he ought to have used the gross-up figure based upon that inflation rate, as determined by the actuary.[80]

b. Income Tax Rules

One of the assumptions concerning future taxation is the extent to which income taxes will become a larger share of personal income in the future. Given that the tax system is not perfectly indexed, future inflation would increase real taxes over time. Moreover, productivity gains for wage earners would raise individuals into higher tax brackets. However, given that the ratio of aggregate income taxes to aggregate personal income has remained virtually unchanged since 1970,[81] it is reasonable to assume that the nominal amounts in the tax system, such as the personal exemption and the tax brackets, will be increased with inflation. Thus, the indexation of personal exemptions and tax brackets for inflation only in excess of three percent under the current *Income Tax Act*[82] will likely mean that there will be *ad hoc* periodic adjustments to those nominal amounts to repair the erosion caused by the cumulative effect of failing to index for the initial three percent. Although this assumption is frequently made by actuaries, it is not applied uniformly.

The appropriate gross-up amount will also depend upon the extent to which tax concessions are and continue to be available, and the extent to which they are utilized. For example, section 81(1)(g.1) of the *Income Tax Act*[83] excludes, from the computation of income, the investment income derived from a personal injury award until the injured person attains the age of twenty-one. Similarly, section 110(1)(c) of the *Income Tax Act*[84] permits a

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[80] *Ibid.* But see *McErlean v. Sarel*, *supra*, note 27, discussed *supra*, note 66, in which the Court of Appeal criticized the trial judge for accepting the respondent's expert evidence, and its ultimate results, uncritically.

[81] The ratio of aggregate income taxes to aggregate personal income was 13.2% in 1970, and 13.9% in 1985 (Statistics Canada, CANSIM data tapes).

[82] *Supra*, note 51, s. 117.1.

[83] *Ibid.*

[84] *Ibid.*

deduction for medical expenses to the extent they exceed three percent of income. Although nursing care is deductible under this section, housekeeping services are not. Even if all future care expenses were deductible, however, the problem explained earlier,[85] with respect to the nature of a self-extinguishing fund during periods of inflation, would still remain. As we indicated, even if medical needs were spread evenly over time in these circumstances, the medical deduction would be insufficient in the early years, and wasted, in part, in the later years. Moreover, where future care expenses are not spread evenly over time, for example, where an artificial limb must be replaced periodically, the medical expense deduction again may not be utilized fully.

c. Nature of Investments

A crucial assumption in the gross-up calculation, which is associated closely with the assumptions made in connection with the future impact of income taxation, is the manner in which the future care award is to be invested. The Canadian tax system treats income differently, depending upon its source. For example, capital gains are taxed at one-half the usual rate,[86] and there is a $500,000 lifetime exemption on gross capital gains.[87] Further, in general, dividend income is taxed at a lower rate than interest income.[88] Therefore, given the present tax system[89] and the expected before-tax rates of return on various types of investments, it may not be rational economically to invest one hundred percent of one's assets in interest bearing securities.

As a result of the preferential treatment accorded to dividends and capital gains income, the expected after-tax rates of return on corporate shares will be much higher than for interest bearing securities, particularly when there is inflation.[90] Moreover, there are other tax-favoured investments available to the average person, for example, the owner occupied home. Thus, the recipient of an award may benefit from investing in her own home, by reducing her mortgage.

In view of the differential tax treatment accorded to various securities, it is abundantly clear that the appropriate gross-up amount will depend upon the investment strategy adopted by the plaintiff. For example, the lifetime capital gains exemption will lead defendants to argue that plaintiffs

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[85] *Supra*, this ch., sec. 3(a).

[86] *Income Tax Act*, *supra*, note 51, s. 38(a).

[87] *Ibid.*, s. 110.6.

[88] *Ibid.*, ss. 82(1) and 121.

[89] Existing proposals for reform of the income tax system might affect the reasonableness of the assumption. See *supra*, note 72.

[90] This assumes that interest rates do not adjust perfectly to offset tax liability.

should arrange their investment portfolio to take advantage of this tax concession. However, many courts do not believe a plaintiff should be expected to engage in sophisticated investment schemes with substantial risk; rather they assume that the lump sum will be invested in government bonds, even though this increases the amount of the gross-up.

In *Julian v. Northern and Central Gas Corp. Ltd.*,[91] Morden J.A. dealt with the issue in the following terms:[92]

> As far as investment in common stocks is concerned (presumably it is the dividend tax credit which is contemplated in this submission) the evidence was that the widow should not be expected to take investment risks and the gross[-up] rate was determined as being that available on secure investments. I think that this is the right approach.

Similarly, in *Perciballi v. Leamington District Memorial Hospital*,[93] it was contended that the plaintiff should invest in shares of Canadian companies in order to take advantage of the Indexed Security Investment Plan provisions of the *Income Tax Act*,[94] which excluded from tax the gain attributable to inflation. Mr. Justice O'Leary rejected this submission, saying "it would in my view be wrong to require the plaintiff to run the risk of investing in such shares".[95]

On the other hand, in *De Champlain v. Etobicoke General Hospital*,[96] Mr. Justice Montgomery accepted the concept of a balanced safe portfolio consisting of treasury bills, preferred and common stocks and some safe tax-favoured investments. Montgomery J. stated that "[w]hile the plaintiff should have safe investments and is not obliged to gamble, the defendant, in my view, is entitled to have gross-up calculated on the basis that the plaintiff will do with her money what any sensible investor in her position would do".[97] Finally, in *Nielsen v. Kaufmann*,[98] the Ontario Court of Appeal acknowledged, and then resolved, the competing interests in the following manner:[99]

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[91] (1979), 31 O.R. (2d) 388, 118 D.L.R. (3d) 458 (C.A.) (subsequent reference is to 31 O.R. (2d)), leave to appeal to the Supreme Court of Canada denied (1980), 31 O.R. (2d) 388*n*.

[92] *Ibid.*, at 399.

[93] Unreported (March 6, 1985, Ont. H.C.J.), aff'd unreported (April 10, 1987, Ont. C.A.).

[94] *Supra*, note 51, s. 47.1. Section 47.1(1)-(25) was repealed by S.C. 1986, c. 6, s. 20(1), to delete the rules governing Indexed Security Investment Plans in respect of taxation years after 1986.

[95] *Supra*, note 93, at 46.

[96] *Supra*, note 13.

[97] *Ibid.*, at 105.

[98] *Supra*, note 66.

[99] *Ibid.*, at 205-06.

> There is no doubt that an assumption based on total investment in long-term bonds substantially increases the amount of the gross-up and, in effect, substantially imposes the relevant future risks on the defendant. On the other hand, while an assumption based on an investment in stocks ameliorates the position of the defendant, at the same time it also imposes well-known investment risks on the plaintiff who, of course, is not the wrongdoer. A reasonable balance has to be found on the facts of any given case.

d. Rate of Withdrawal

A further ingredient in the gross-up calculation is the assumption concerning the rate of withdrawal of the funds for future consumption or care.[100] For example, if a plaintiff were to spend all of her award immediately, there would be no investment income generated by the award and, consequently, no income tax would be payable. The longer the plaintiff delays consumption, the greater will be the impact of taxation, and the greater will be the required tax gross-up.

At present, actuaries determine the amount of constant real consumption that the damages award can support over the plaintiff's life expectancy. The withdrawals are assumed to occur as equal real amounts per year.

e. Amount of Other Income

The rate of tax on the investment income derived from the future care award will depend upon the amount of other income the plaintiff might have. The higher the total income of the plaintiff, the higher the tax rate, and the greater the required gross-up amount will be. Thus, the logic of the gross-up calculation requires that account be taken of the incremental tax resulting from any additional investment or other income of the plaintiff.

In *De Champlain v. Etobicoke General Hospital*[101] the gross-up was calculated on the fund for future care without regard to the existence of other income. Although this would understate the tax liability of the plaintiff, because the marginal rates would be unrealistically low, Montgomery J. did suggest that he would take account of the possibility of higher taxes as a contingency favouring the plaintiff.[102]

On the other hand, in *Nielsen v. Kaufmann*,[103] the Court of Appeal acknowledged that "a choice exists to treat the award to be grossed up as the first income of the plaintiff for the purpose of computing a rate of taxation

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[100] This is often referred to as the "draw-down" assumption.

[101] *Supra*, note 13.

[102] *Ibid.*, at 104.

[103] *Supra*, note 66.

or, alternatively, as the last item of income and hence the highest marginal rate".[104] The Court made its choice by concluding that "[t]here is no justification for ignoring Mr. Nielsen's probable actual tax rate which, of course, would be based on his total income".[105]

(c) Deficiencies in the Current Law

The specific concerns that have been raised in connection with the gross-up calculation are the large sums of money involved, the unpredictability of result, and the high transaction costs. The high transaction costs are a direct result of the fact that, in every case, expert evidence must be adduced respecting factors that are external to the parties to the action. Thus, for example, in every case the court must hear expert evidence about the anticipated rate of inflation. It is of interest to note that the discount rate, now prescribed in the Rules of Civil Procedure, was established for the very purpose of avoiding this repetitive and costly process. Yet, the precise problem that the prescribed discount rate was intended to avoid has re-emerged in the highly analogous context of gross-up. In order to calculate gross-up the court, in every case, must hear, in addition to evidence concerning the anticipated rate of inflation, expert evidence about the anticipated future income tax laws. These are matters about which expert opinions may vary. Not surprisingly, therefore, the requirement that they be proved in each case has contributed to the undue variability and uncertainty of result associated with the gross-up calculation. Indeed, there have been aberrational results of extraordinarily high gross-up amounts in some cases.[106]

In *Nielsen v. Kaufmann*,[107] the Ontario Court of Appeal made the following remarks concerning the unsatisfactory state of the current law:

> The foregoing indicates that what is a proper amount for gross-up will depend largely on the facts presented to the court. The results in individual cases can, accordingly, vary widely. If a substantial degree of uniformity of treatment is considered desirable in these cases, then it appears to us that this is

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[104] *Ibid.*, at 204.

[105] *Ibid.*, at 205. This case concerned an action for damages for wrongful death. An amount for gross-up was included in the award of Mr. Nielsen, the husband of the deceased, as compensation for his future income tax liability on the income derived from the award for future pecuniary loss. The Court of Appeal confirmed that Mr. Nielsen's own income should be included in the calculation. While no extensive analysis of the issue was provided, the decision may be interpreted as authorizing inclusion, in the gross-up calculation, of only the plaintiff's other *earned* income.

[106] See, for example, *Giannone v. Weinberg*, *supra*, note 37, in which an award of $1,190,141 was supplemented by a gross-up amount of $1,615,000 (that is, gross-up at the rate of approximately 136%). It should be recalled, however, that this case is currently under appeal. See, also, *McErlean v. Sarel*, *supra*, note 27, discussed *supra*, note 66.

[107] *Supra*, note 66, at 206.

> a matter for legislative intervention. The application of a precise statutory formula would, of course, be bound to involve certain arbitrary features. This, however, would be a policy matter appropriate for the Legislature.

More recently, in *McErlean v. Sarel*, the Court of Appeal repeated this observation, and added the following:[108]

> If fundamental approaches to the problem, such as amending the *Income Tax Act* to exempt from liability for tax income from a fund established by an award or settlement to provide for the cost of future care of injured persons are not taken, it may be that, more modestly, steps could be taken to provide for uniform investment and inflation rates based on reasonable data and adjusted from time to time on the basis of current data.... Such a provision would cover important components in the initial calculation of a gross-up and would result in a larger measure of uniformity and predictability with respect to these awards than we now have.

(d) Recommendations

(i) Preferred Approach—Amendment of Tax Laws

Undoubtedly the most effective, and, in our view, the preferred solution to the gross-up problem would be an amendment to the income tax laws. With respect to the first factor we identified above as contributing to the need for gross-up, we anticipate that, from time to time, the income tax authorities will give consideration to bringing the medical expense deduction, insofar as possible, into conformity with the items allowable by the courts as legitimate costs of care. With respect to the second contributing factor, we acknowledge that it might not be reasonable, as some have suggested, to expect that the federal government would allow a complete tax exemption for the investment of damage awards, since there is no guarantee that the proceeds actually would be spent on medical care. However, a simple expedient would be to permit a tax sheltered plan, analogous to a registered retirement savings plan, that would shelter the investment derived from the portion of the award or settlement attributable to the cost of future care. Indeed, a variety of such schemes can be envisaged.

The closest analogy to a registered retirement savings plan would permit the plaintiff to pay into the plan, annually, an amount equal to the income received from the invested proceeds of the award. The plaintiff would receive a corresponding tax deduction in each year. Withdrawals from the plan, however, would be taxed in the year of withdrawal, subject to the present rules, including the medical expense deduction. Although the

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[108] *Supra*, note 27, at 73. It is of interest to note that this Commission had reached a similar conclusion prior to the release of the Court of Appeal decision. See the recommendations discussed *infra*, this ch., sec. 3(d)(ii).

need for gross-up would not disappear under such a scheme, it would be very much reduced.[109]

A second possible scheme would permit investment in the plan of the entire amount of compensation awarded for future care. Investment income could then accumulate in the plan, free of tax, while the plaintiff would be taxed on withdrawals; again, subject to the present rules. However, since the sum originally deposited in the plan represented a capital sum, only withdrawals of the accumulated interest should be taxed. Accordingly, under this scheme, the plaintiff would be taxed on withdrawals from the plan only until the amount remaining in the plan equalled the amount originally paid in. That amount, being a capital sum, could then be withdrawn by the plaintiff free of tax.

A third possible variation would tax withdrawals from the plan only insofar as they were not spent for the purposes for which the compensation was awarded. This would have the advantage of extending the tax benefit to expenses that are recognized by courts as proper costs of future care, but are not deductible as medical expenses under the *Income Tax Act*.[110] On the other hand, it might create difficulties, particularly in cases of settlement, in determining precisely what expenses were envisaged when the amount of compensation was determined.

A potential difficulty with the first scheme described above is that the plan holder might be able to meet her medical expenses out of other resources, thereby maximizing the benefit of the tax shelter by investing the whole of the income in the plan. Such a plaintiff would indeed obtain a tax advantage, although she would have to pay tax on the proceeds of the plan when ultimately withdrawn. Similarly, the second scheme might create the incentive to maximize the tax benefit by simply allowing the funds to accumulate in the account, tax free, while medical expenses are met out of other resources. Again, however, the plaintiff would have to pay tax on the proceeds of the plan when ultimately withdrawn. Another potential difficulty that might arise in respect of each of the above schemes is that they might create an incentive to negotiate settlements in which the portion eligible for investment in the protected plan would be exaggerated. In this respect, however, it might be said, legitimately, that, as in many other instances, in a disputed case Revenue Canada will assess the reasonableness of the allocation.

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[109] It will be recalled that only medical expenses in excess of 3% of income are deductible. Further, as we have indicated, not all costs allowable as costs of future care qualify for the medical expense deduction. It would seem desirable for the *Income Tax Act*, *supra*, note 51, to be amended to permit the deduction of all medical expenses, not only those in excess of 3% of income, and so that the definition of medical expenses will correspond with the items allowable by the courts as legitimate costs of care. However, the existing proposals for reform of the income tax system, described *supra*, note 72, would not effect these amendments.

[110] *Supra*, note 51.

On balance, the second scheme described above seems to us the simplest to administer, and the one most apt to remedy the problem of overtaxation, in the early years, of the income generated by the award. As we noted above, the need for gross-up would not disappear with the establishment of a tax sheltered plan, but it would be much reduced.[111] The cost of such a plan to Revenue Canada would not be great. Upon the death of the plaintiff, the entire amount of the interest earned and remaining in the plan would be taxable in the hands of his estate, with probable gains to Revenue in many cases. The costs of administering and policing the present exemptions would disappear. Judicial time would be saved, and the costs of litigation would be diminished greatly by the reduced need for experts on both sides to assemble and give evidence.

We wish to emphasize that the case for such tax reform is not that special treatment should be given to a favoured group, which, it seems, is currently an unpopular view in tax circles. Rather, it is that the tax rules, during periods of inflation, overtax the income, in the early years, from a fund invested to produce a postponed annuity. This is the same principle that underlies the present system of retirement savings plans. We recommend, therefore, that the Government of Canada be urged, by strong representations at the highest level, to introduce such a scheme.

(ii) Alternative Approach—Standardization of Gross-Up Assumptions

So long as there is an adverse affect from income taxation, resulting in a continuing need for gross-up, we have concluded that reform should be instituted provincially, irrespective of any amendments to the *Income Tax Act*, to resolve some of the current problems associated with the calculation of gross-up.[112] Abolition of gross-up seems to us impossible to support, for if the plaintiff actually proves the loss, there seems no sound principle upon which it could be denied. Indeed, the Ontario Court of Appeal has recently articulated the compensatory rationale underlying the award of gross-up in the following terms:[113]

> As a matter of principle, regard has to be paid to the impact of taxation on income from the award for the cost of future care. If this impact is ignored... then the award cannot accomplish its prime purpose, which is to assure that the plaintiff should be adequately cared for during the rest of his life. The effect of the impact of taxation on the award would be to require capital portions of the fund created by the award to be expended sooner than they otherwise would be, with the inevitable result that the fund would be exhausted before it has served its purpose.

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[111] See *supra*, note 109.

[112] An essentially similar approach was suggested by the Ontario Court of Appeal in *McErlean v. Sarel*, *supra*, note 27. See *supra*, note 108 and accompanying text.

[113] *McErlean v. Sarel*, *supra*, note 27, at 64-65.

Thus, to the extent that income tax continues to be payable on the income derived from investment of the future care award, the objective of full compensation requires that an amount be included in the award to offset that liability. We therefore strongly endorse the principle underlying the award of gross-up, and we recommend that legislation should be enacted, at the earliest opportunity, to provide that an award of damages for future care shall include an amount that would offset liability for income tax on income from investment of the award.[114]

We have concluded, however, that the assumptions underlying the gross-up calculation should be standardized in order to achieve consistency, and to avoid the necessity of repeated hearings on the estimates of future inflation, income tax changes, and the complex actuarial and accounting principles involved, and we so recommend.[115] The rationale for standardizing the assumptions underlying the gross-up calculation is that, although standardization may lead to a slightly less precise result in any individual case, this loss is outweighed by the advantage of consistency and by the savings to the parties and to the courts in costs. We set out below our specific recommendations as to the assumptions to be made concerning the rate of future inflation, the future impact of income taxation, the investment strategy to be followed with the lump sum award, the rate of withdrawal, and the amount of other income of the plaintiff. The table in Appendix 4 illustrates the amount of gross-up that would result, in a variety of factual situations, upon an application of the assumptions we recommend.

We note that our recommendations standardizing the assumptions underlying the gross-up calculation do not address all of the variables affecting the calculation. A number of factors will remain to be proved on a case by case basis, for example, the plaintiff's life expectancy and the percentage of the future care costs that would qualify for the medical expense deduction under the *Income Tax Act*.

a. Rate of Future Inflation

In order to respond to the inevitable changes in economic conditions, and yet avoid any sudden and anomalous results, we recommend that the future rate of inflation should be assumed to be the average of the annual rates of change in the Consumer Price Index (all items, Canada) for the five year period ending in October of the year prior to the year in which judgment is given. We further recommend that this amount should be adjusted to the nearest one-half percentage point.[116] We believe that this

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[114] See the draft *Personal Injuries Compensation Act* proposed by the Commission (hereinafter referred to as "draft Compensation Act"), *infra*, Appendix 1, s. 7.

[115] See the draft Rule for Inclusion in the Rules of Civil Procedure proposed by the Commission (hereinafter referred to as "draft Rule"), *infra*, Appendix 3.

[116] Draft Rule, para. (b).

assumed rate of inflation would be averaged over a sufficiently long period of time to ensure that no undesirably large changes in the assumed rate would result from year to year. The average for the five year period ending in October would be available six weeks later, and would apply to the next calendar year. This figure would be 5.5 percent for the current year.

b. Income Tax Rules

We recommend that the gross-up calculation should be made using the income tax laws enacted or made at the time of trial, including any future changes in the income tax laws, enacted or made at the time of trial, but not applicable until a subsequent tax year. However, we have concluded that all fixed dollar amounts in the *Income Tax Act*[117] should be assumed to increase annually at the assumed rate of inflation, and we so recommend.[118] If the nominal amounts in the current tax system were not indexed for inflation, tax brackets would creep upward by three percent per year, and items such as the $1,000 interest and dividend deduction would become trivial. Ultimately, a person with average income, in today's prices, would be in the highest tax bracket. It is expected, therefore, that as long as inflation persists, periodic modifications will be made to the tax system to mitigate this effect.

c. Nature of Investments

The funds from an award for future care, in our view, should be assumed to be invested fifty percent in equities and fifty percent in interest-bearing investments.[119] While it might be argued that this recommendation presupposes the assumption of an unacceptably high degree of risk, we emphasize the fact that the future care funds would not be the only funds available for investment: ordinarily compensation for loss of future working capacity would also be awarded. Accordingly, the plaintiff's total investment portfolio might well include a much higher percentage of secure interest-bearing investments. It is only the award for future care that would be assumed to be invested as set out above, and only for the purpose of calculating gross-up. We recognize that, in practice, a wide variety of investment strategies will actually be followed by successful plaintiffs.

d. Return on Investment

In respect of both interest-bearing securities and equity securities the real rate of return on investment should be assumed to be the rate specified,

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[117] *Supra*, note 51.

[118] Draft Rule, para. (a).

[119] *Ibid.*, para. (e).

from time to time, in rule 53.09,[120] in respect of the discount rate, and we so recommend.[121] This would ensure that a single, constant, real rate of return is utilized throughout the damage assessment process. The current real rate of return, therefore, would be assumed to be 2.5 percent. In the case of equity securities, however, the total annual return should be assumed to be composed of dividend income, at the annual rate of 3.5 percent of capital,[122] and capital gains, to the extent of the remainder. Moreover, it should also be assumed that the capital gains are realized in each year.[123] This latter assumption has the effect of raising taxes once an individual has exhausted the lifetime capital gains exemption. In practice, those who are subject to tax on their capital gains could reduce their effective rate of tax considerably by delaying the realization of the gains.

e. Rate of Withdrawal

We noted earlier[124] that, at present, actuaries determine the amount of constant real consumption that the damages award can support over the plaintiff's life expectancy, and assume withdrawals to occur as equal real amounts per year. The problem with this approach is that it is not possible to guarantee that an individual will live a given number of years. One must save for the possibility of greater than average longevity. There are, however, at least two other methods of dealing with the timing of consumption.

The first approach would require that the damages be determined for every possible outcome and the expected tax in respect of each outcome then calculated. For example, the plaintiff might die at the age of 103 (the last year in the life tables) with probability .00001. The damages that would provide benefits to the age of 103 without taxes would be calculated, followed by a calculation of the gross-up for someone living to 103 years of age. The expected loss would be .00001 multiplied by the sum of the damages and the gross-up. The damages would then be calculated for the possibility that the victim would die at the age of 102 years, and so on. While this approach is conceptually correct, in the sense that it gives the expected loss, the actual taxes that will be incurred will not equal the predicted taxes. The actual taxes are a function of the actual withdrawal of funds. An advantage of this approach is that it is not dependent on any particular assumption concerning the pattern of consumption. A disadvantage of this approach is the added computational complexity; it requires that the damages and gross-up be calculated many times over.

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[120] Reproduced *supra*, note 77.

[121] Draft Rule, para. (c).

[122] The average dividend yield on the Toronto Stock Exchange was 3.6% for the period 1956 through 1986 (Statistics Canada, CANSIM data tapes).

[123] Draft Rule, para. (d).

[124] *Supra*, this ch., sec. 3(b)(ii)d.

The final approach, which we believe is preferable, would assume that the withdrawals for consumption equal the expected loss for the year. For example, if the loss is $1,000 in the first year, and the probability of surviving that year is .99, the expected loss for the first year is $990. If the probability of surviving the next year is .98, the withdrawal in the second year is $980. The damages prior to gross-up are, in fact, the discounted sum of these values.

There is also an economic argument in favour of this approach. Someone who is relying on a capital fund for consumption will have to decide how much to consume in each year, not knowing when she will die. If all of the funds are consumed in the first year, there will be nothing left in the event that she survives to the second year. On the other hand, if she does not consume everything in the first year, there is a possibility that she will die without having enjoyed the funds that she has received. Given certain assumptions concerning the utility function, the optimal pattern of consumption under such uncertainty will be downward sloping with the probability of survival, in precisely the way that the expected loss declines.[125]

This method thus has the advantage that it provides a rational basis for a particular pattern of consumption. Accordingly, we recommend that the rate of withdrawal from the fund for future care in any year should be assumed to equal the expected loss for that year, taking account of the probability of surviving to that year and all contingencies used in the calculation of the present value of the costs of future care.[126]

f. Amount of Other Income

With respect to the other income of the plaintiff, there are a number of possible approaches. As we noted above,[127] one approach would simply calculate the gross-up on the fund for future care without regard to the existence of other income. This, as we pointed out, would understate the tax liability of the plaintiff. Another approach, articulated by the Ontario Court of Appeal in *Nielsen v. Kaufmann*,[128] is to recognize the plaintiff's other income on the ground that "[t]here is no justification for ignoring [the plaintiff's] probable actual tax rate which, of course, would be based on his total income".[129] We have concluded that the desirable approach lies between the extremes of no recognition and full recognition of the plaintiff's

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[125] See Kotlikoff and Spivak, "The Family as an Incomplete Annuities Market" (1981), 89 J. Pol. Economy 372.

[126] Draft Rule, para. (f).

[127] *Supra*, this ch., sec. 3(b)(ii)e.

[128] *Supra*, note 66.

[129] *Ibid.*, at 205.

other income. Accordingly, we are of the view that the plaintiff's future income, earned after the accident, and the plaintiff's investment income derived from the award for loss of working capacity should be taken into account in the gross-up calculation, but the plaintiff's income from other sources should be ignored for this purpose, and we so recommend.[130]

We recognize that the effect of a rule that would not account for all of the plaintiff's other income would be, in certain circumstances, to ignore the plaintiff's actual rate of income tax. We are persuaded, however, that the principle of equality of treatment of similarly injured plaintiffs militates against a rule that would account for all of the plaintiff's investment and other income.[131]

Moreover, if all of the plaintiff's investment and other income were taken into account, enormous awards of gross-up, in some cases, would have to be made. While the rule we recommend is inevitably arbitrary, we take some comfort in the knowledge that, to the extent it will result in undercompensation, it will do so most often in those cases in which the plaintiff has substantial wealth, and is therefore best able to cope with the result.

g. Implementation and Review

In order to ensure that the above rules remain responsive to prevailing economic conditions, they should be implemented by amendment to the Rules of Civil Procedure,[132] and should be subject to review by the Rules Committee. Accordingly, we recommend that the *Courts of Justice Act, 1984*[133] should be amended to provide that the Rules Committee of the Supreme and District Courts may make rules in relation to the method of calculating the amount to be included in an award for damages for future care that would offset liability for income tax on income from investment of the award.[134] The rules recommended in this section should be reviewed if they appear to lead to an incorrect assessment of losses in light of future economic developments. For example, changes in the tax system might affect the reasonableness of the above assumptions.[135] In any event, we recommend that the rules should be reviewed formally at least once every

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[130] Draft Rule, para. (g).

[131] The plaintiff's other income was apparently ignored on this ground in *Taylor v. O'Connor*, [1971] A.C. 115, [1970] 2 W.L.R. 472 (H.L.).

[132] O. Reg. 560/84.

[133] S.O. 1984, c. 11.

[134] See the draft *Courts of Justice Amendment Act* proposed by the Commission (hereinafter referred to as "draft CJA Act"), *infra*, Appendix 2, s. 1(1).

[135] See *supra*, note 72.

four years and that the *Courts of Justice Act, 1984*[136] should be amended accordingly to so provide.[137]

4. DUPLICATION OF LIVING COSTS

A potential for duplication exists between compensation in respect of the cost of future care and compensation in respect of lost earning capacity. The source of this potential overlap is the amount awarded for basic necessities of life; that is, compensation for food, clothing and shelter. The nature of the overlap and the alternative methods of resolving the conflict were addressed by Dickson J. in *Andrews v. Grand & Toy Alberta Ltd.*, in the following terms:[138]

> It is clear that a plaintiff cannot recover for the expense of providing for basic necessities as part of the cost of future care while still recovering fully for prospective loss of earnings. Without the accident, expenses for such items as food, clothing and accommodation would have been paid for out of earnings. They are not an additional type of expense occasioned by the accident.
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> When calculating the damage award, however, there are two possible methods of proceeding. One method is to give the injured party an award for future care which makes no deduction in respect of the basic necessities for which he would have had to pay in any event. A deduction must then be made for the cost of such basic necessities when computing the award for loss of prospective earnings: *i.e.* the award is on the basis of net earnings and not gross earnings. The alternative method is the reverse: *i.e.* to deduct the cost of basic necessities when computing the award for future care and then to compute the earnings award on the basis of gross earnings.

Mr. Justice Dickson then expressed his preference for the first approach. Reasoning that "proper future care is the paramount goal of [personal injury] damages",[139] his Lordship preferred to ensure that the costs of care included all the plaintiff's needs, while the cost of basic necessities were deducted from the loss of earnings. The same approach was adopted in *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*.[140] The opposite method, however, was applied by Spence J. in *Arnold v. Teno*,[141] which held that the cost of basic necessities should be excluded from the award for cost of future care.[142]

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[136] *Supra*, note 133.

[137] Draft CJA Act, s. 1(2). A similar recommendation for review, at least once every four years, is made herein in respect of the discount rate. See *infra*, ch. 8, sec. 2.

[138] *Supra*, note 2, at 250.

[139] *Ibid.*

[140] *Supra*, note 5.

[141] *Supra*, note 4.

[142] This approach has also been employed by the House of Lords (*Lim Poh Choo v. Camden and Islington Area Health Authority*, [1980] A.C. 174, [1979] 3 W.L.R. 44) and the Ontario High Court (*Schmidt v. Sharpe*, *supra*, note 14).

It has been suggested,[143] that the plaintiff's losses may be categorized as either positive or negative. According to this analysis, future care costs are best understood as being positive: as a result of the injury, the defendant has caused the plaintiff additional expenses for which the plaintiff is entitled to receive compensation. Loss of earnings, on the other hand, are best understood as being negative: the defendant has deprived the plaintiff of the benefit of the use of her working capacity. Analyzed in this way, compensation in respect of the plaintiff's basic living expenses do not fall conceptually under the rubric of future care costs. They are not added expenses that have been imposed upon the plaintiff as a result of the injury; rather they represent expenses that all individuals must meet, whatever their circumstances. It is only if the injury has caused some additional expense, for example, for special accommodation or a special diet, that the cost of care head of damage is properly invoked. In these circumstances, moreover, the future care head of damage is appropriate only to the extent of the excess, that is, the amount by which the cost of the plaintiff's post-accident basic necessities exceeds the cost that would have been incurred by the plaintiff for necessaries had the injury not been sustained. If the plaintiff is then awarded full compensation for her loss of earnings, she will be restored financially to her pre-accident position; she will be required to meet her basic living expenses out of earnings precisely as she would have been required to do had the injury not occurred.

The approach adopted in the *Andrews* case might produce an inequitable result if the court were simply to calculate how much the plaintiff would have spent on food, clothing and shelter and deduct that amount from the loss of earnings award. Such an approach would appear to be premised on an assumption that the plaintiff's post-accident basic necessity expenses equal the basic necessity expenses that the plaintiff would have incurred had he not been injured, and that subtracting that amount from earning capacity corrects duplication that would otherwise result from its inclusion under the future care award. Such an assumption, however, may be false. Depending upon income and preferences, a plaintiff requiring institutional care could be predicted to have spent, had he not been injured, either more or less than the cost of necessities provided by the institution. Thus, for example, where the plaintiff requires institutional care, this method would fail to account for the difference in quality between the standard of living that the plaintiff would have purchased for himself and the standard of living that the plaintiff would receive through the institution.[144]

If, as part of the future care award, the plaintiff received only the additional cost of living occasioned by the accident, together with the full loss of earnings award, he would be free to improve upon the standard of

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[143] See Munkman, *Damages for Personal Injuries and Death* (7th ed., 1985), at 12-13.

[144] See *Shearman v. Folland*, [1950] 2 K.B. 43, [1950] 1 All E.R. 976 (C.A.).

living provided by the institution, if possible, or to divert his earnings to some other interest, just as he might have done had he not been injured. If, however, the court deducts from the loss of earnings award whatever the plaintiff would have spent on shelter, food and clothing, this may be more than the cost of necessities provided by the institution. In this case the plaintiff would be denied the opportunity to maintain for himself the standard of living he would have been able to afford had he continued his employment. The means of doing so—his full income—has been denied him. Instead, he will be confined to whatever standard the institution provides.

We believe that conceptual clarity would be fostered by a solution that would award the plaintiff his full damages for loss of working capacity and, as part of the future care award, only the *additional* cost of basic necessities incurred as a result of the accident. To the extent that such an approach would compensate the plaintiff only for his net costs after accounting for the costs that would have been incurred in any event, it is consistent with the restitutionary principle approved throughout the *Andrews* decision. Moreover, such an approach would enable the proper calculations to be made in respect of the appropriate expectancy period,[145] contingencies,[146] and gross-up for income tax.[147] We believe these would be substantial advantages. Nevertheless, we do not recommend specific legislative intervention. Not only would legislation be difficult to draft, but the problems in this area of the law, identified above, are likely to be solved in due course by the courts themselves.

5. THIRD PARTY CLAIMS

Prior to the 1970s, where care or the cost of care was provided by a third party, the plaintiff was held to have suffered no pecuniary loss, and was not compensated unless she was under a moral or legal obligation to repay the third party.[148] The rule favoured only the plaintiff who was shrewd enough to contract with the care giver for the required services.

In two decisions of the English Court of Appeal, rendered in 1973, it was held that an injured party, cared for by a close relative, could recover the

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[145] The pre-accident life expectancy is relevant for the calculation of loss of earning capacity, while the post-accident life expectancy is the relevant period for calculating the future cost of care.

[146] See *infra*, ch. 8, sec. 1.

[147] See *supra*, this ch., sec. 3.

[148] See Waddams, *The Law of Damages* (1983), para. 368, at 210-11. As a factual matter, it is usually a relative of the victim who provides such care, although the same problems may arise when care is provided by others, for example, a close friend.

value of the nursing services provided even though there was no obligation to reimburse the provider.[149] Conceptually, these cases assessed the victim's loss as a *need* for services caused by the defendant, rather than the cost of the services actually incurred. This approach has since been adopted in Canada[150] and endorsed by the Supreme Court of Canada.[151] Some cases have held that the plaintiff will be required to hold the money on trust.[152]

The enactment of *The Family Law Reform Act, 1978*[153] created two uncertainties. For the first time the Act gave a right of action to the members of a designated class[154] for the following: (1) "actual expenses reasonably incurred for the benefit of the person injured or killed";[155] (2) "actual funeral expenses reasonably incurred";[156] (3) "a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery";[157] and (4) "where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services".[158] Thus, a sister who provided care presumably would have a claim under the Act, but a cousin, who was not a member of the designated class, would not. Because the Act permitted an action to be brought only by the eligible relatives, the question arises whether the legislation was intended to abrogate the common law rights of the injured plaintiff to recover, and then, perhaps, to account for, the value of the services provided by a cousin. The better view, we suggest, is that the additional claims enumerated in the legislation were intended solely for the benefit of the designated class. There would appear to be no difficulty with the modern common law position insofar as it affects non-designated relatives and other providers of care

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149 *Donnelly v. Joyce*, [1974] Q.B. 454, [1973] 3 W.L.R. 514 (C.A.), and *Cunningham v. Harrison*, [1973] Q.B. 942, [1973] 3 W.L.R. 97 (C.A.).

150 See Waddams, *supra*, note 148, para. 369, at 211-12, and cases cited *ibid.*, *nn.* 127-28.

151 *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, *supra*, note 5.

152 *Cunningham v. Harrison*, *supra*, note 149, and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, *supra*, note 5. See, also, *Coderre v. Ethier* (1978), 19 O.R. (2d) 503, 85 D.L.R. (3d) 621 (H.C.J.), in which the plaintiff gave an undertaking to pay the money over.

153 S.O. 1978, c. 2. See, now, *Family Law Act, 1986*, S.O. 1986, c. 4, s. 61.

154 Section 61(1) of the *Family Law Act, 1986*, *ibid.*, permits an action to be brought by the spouse, children, grandchildren, parents, grandparents, brothers and sisters of the person injured or killed.

155 This is the present language of s. 61(2)(a) of the *Family Law Act, 1986*, *ibid.* Previously the wording was "actual out-of-pocket expenses reasonably incurred for the benefit of the injured person" (*Family Law Reform Act*, R.S.O. 1980, c. 152, s. 60(2)(a)).

156 *Family Law Act, 1986*, *supra*, note 153, s. 61(2)(b).

157 *Ibid.*, s. 61(2)(c).

158 *Ibid.*, s. 61(2)(d).

services. Their claims may be compensated, if at all, indirectly through the victim's own recovery.

More problematic is the determination of the proper party to claim the value of services provided by one of the relatives designated in the legislation. Is the proper party the relative who has been designated specifically in the statute, or, alternatively, is the proper party the injured plaintiff, as under the common law? It has been suggested that the Act should be construed to provide a cause of action in the named relative only in respect of losses not recoverable by the injured person.[159] This, however, might lead to an injustice in the event that the plaintiff were to recover the value of care provided by the relative and then to refuse to refund that sum to the provider of care. The legislation would seem to contemplate that the dependant could make the claim in his or her own right to avoid such a situation. If so, however, there would appear to be no reason for restricting that particular right to a limited class of dependants.

To resolve this problem it is necessary to decide whether the provision of such care generally is truly in the nature of a gift, in which case the plaintiff should recover the sum and then refund it, or not, according to her conscience; or to recognize the provision of such care as entailing a corresponding right (albeit not a contractual right) in the provider to recover its value, in which case all persons who provide care other than by statute or contract, and not just designated dependants, should enjoy such a right. This latter view raises the possibility of increased litigation, but perhaps no more than is already inherent in the other provisions of section 61 of the *Family Law Act, 1986*.[160]

The current law in Ontario would appear to permit both approaches. In *Dziver v. Smith*[161] it was held that the Act did not repeal the right of an injured party to assert a claim in respect of the services provided if the relative did not assert a similar claim. No case has yet arisen in which the victim and the relative have asserted competing claims, the type of case in which the court would be called upon to decide the precise issue addressed above.

We have concluded that the present uncertainty surrounding the relationship between *Family Law Act, 1986* claims and the injured person's own claim should be resolved by legislation. Since the injured person will still have to claim such damages, in her own right, in those cases in which the provider is not one of the eligible relatives under the *Family Law Act, 1986*, we have concluded that the overlap ought to be removed by repealing section 61(2)(a), (b), (c), and (d) of the *Family Law Act, 1986*,[162] while

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[159] See Waddams, *supra*, note 148, para. 372, at 213-14.

[160] *Supra*, note 153.

[161] (1983), 41 O.R. (2d) 385, 146 D.L.R. (3d) 314 (C.A.).

[162] Draft Compensation Act, s. 17.

providing, for the sake of certainty, that the injured person has the right to compensation in such cases, and that the court may order that the compensation be held on trust for the provider of the services.[163] We so recommend. As a factual premise, it seems to us most likely that relatives provide care without the expectation of reward from the victim. In most cases, however, if they were to turn their minds to the question, the victim and the relative would probably agree that the victim would account for any recovery in respect of such services to the provider. The above recommendation would not only remove the potential overlap between a *Family Law Act, 1986* claim and an injured plaintiff's own claim; it would also enable the court to give effect to the legitimate expectations of the individuals involved.

RECOMMENDATIONS

The Commission makes the following recommendations:

1. There should be no change in the present law respecting the general test of "reasonableness" to determine the standard of care to be awarded to a successful plaintiff in a personal injury action.

2. (1) The Government of Canada should be urged, by strong representations at the highest level, to introduce a tax sheltered plan, analogous to a registered retirement savings plan, that would permit investment in the plan of the entire amount of compensation awarded for future care.

   (2) Investment income should be permitted to accumulate in the plan, free of tax.

   (3) The plaintiff should be taxed on withdrawals from the plan, subject to the ordinary rules, including the medical expense deduction, only until the amount remaining in the plan equals the amount originally paid in, which amount the plaintiff should then be able to withdraw free of tax.

3. Legislation should be enacted, at the earliest opportunity, to provide that an award of damages for future care shall include an amount that would offset liability for income tax on income from investment of the award.

4. The *Courts of Justice Act, 1984* should be amended to provide that the Rules Committee of the Supreme and District Courts may make rules in relation to the method of calculating the amount to be included in an award of damages for future care that would offset liability for income tax on income from investment of the award.

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[163] *Ibid.*, s. 4(1) (b)-(e), and (2).

5. For the purpose of calculating the amount to be included in an award of damages for future care under Recommendation 3, the following assumptions should be standardized and implemented by amendment to the Rules of Civil Procedure:

   (a) the rate of inflation should be assumed to be the average of the annual rates of change in the Consumer Price Index (all items, Canada) for the five year period ending in October of the year prior to the year in which judgment is given, adjusted to the nearest one-half percentage point.

   (b) the income tax laws should be assumed to be the income tax laws enacted or made at the time of trial, including any future changes in the income tax laws, enacted or made at the time of trial, but not applicable until a subsequent tax year; however, all fixed dollar amounts in the income tax laws should be assumed to increase annually at the assumed rate of inflation.

   (c) the funds from an award for future care should be assumed to be invested fifty percent in equities and fifty percent in interest-bearing investments.

   (d) after taking inflation into account, the annual rate of return, in respect of both equities and interest-bearing investments, should be assumed to be the rate specified in the Rules of Civil Procedure, from time to time, in respect of the discount rate, which, at present, would be 2.5 percent.

   (e) the total annual return on equity investments, as determined under paragraphs (a) and (d), should be assumed to be composed of the following:

      (i) dividends, at the annual rate of 3.5 percent of capital; and

      (ii) capital gains, as to the remainder, realized annually.

   (f) the amount that the injured person should be assumed to withdraw from the fund for future care in each year should be the expected cost of future care for that year, taking into account the probability of surviving to that year and all contingencies used in the calculation of the present value of the costs of future care.

   (g) the plaintiff's future income earned after the accident, and the plaintiff's investment income derived from the award for loss of working capacity should be taken into account, but the plaintiff's income from other sources should be ignored.

6. The *Courts of Justice Act, 1984* should be amended to provide that the rules made in relation to the method of calculating the amount to be

included in an award of damages for future care that would offset liability for income tax on income from investment of the award shall be reviewed at least once every four years.

7. Legislation should not be enacted to deal with the possibility, in the assessment of damages in a personal injury action, of duplication in respect of the award for basic necessities of life.

8. The present uncertainty surrounding the relationship between third party claims under the *Family Law Act, 1986* and the injured person's own claim should be resolved by repealing section 61(2)(a), (b), (c), and (d) of the *Family Law Act, 1986*, while providing that the injured person has the right to compensation in such cases, and that the court may order that the compensation be held in trust for the third party.

CHAPTER 5

REVIEWABLE PERIODIC PAYMENTS

1. INTRODUCTION

In this chapter, we shall consider the form that an award of damages should take. The common law has long favoured the award of damages in a lump sum; indeed, in 1927, the Privy Council stated that this was the only permissible form of damages,[1] a view that has been affirmed more recently by the Supreme Court of Canada.[2]

In Ontario, however, a lump sum is no longer the only form in which damages may be awarded to a party. Section 129 of the *Courts of Justice Act, 1984*[3] provides that, in a proceeding in which damages are claimed for personal injuries, or in a proceeding brought under Part V of the *Family Law Act, 1986*,[4] where all the affected parties consent, the court may order the defendant to pay all or part of the award of damages periodically on such terms as the court considers just, or order that the award of damages be subject to future review and revision in such circumstances and on such terms as the court considers just. Thus, under Ontario law, the parties to a

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[1] See *Fournier v. Canadian National Ry. Co.*, [1927] A.C. 167, at 169, where Lord Atkinson described the attempt of a jury to award periodic payments as "quite improper and illegal". See, also, *Waldron v. Rural Mun. of Elfros* (1922), 70 D.L.R. 726, at 731 (Sask. K.B.), aff'd [1923] 4 D.L.R. 1209 (C.A.), where the Court held that a jury's award of periodic payments was "mere surplusage and beyond [its] jurisdiction".

[2] *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452 (subsequent references are to [1978] 2 S.C.R.). See, also, *Lewis v. Todd*, [1980] 2 S.C.R. 694, at 710, 115 D.L.R. (3d) 257, where, in the course of discussing the discount rate, Dickson J. commented that "it is not open to a court, in the absence of enabling legislation, to order periodic payments adjusted to future needs". In *McErlean v. Sarel*, unreported (September 29, 1987), the Ontario Court of Appeal stated (at 66) that "the respondent [the injured plaintiff] is legally entitled to a lump sum judgment and is not legally obliged to accept periodic payments". But see the recent judgment of the Manitoba Court of Appeal in *Watkins v. Olafson*, [1987] 5 W.W.R. 193, in which the Court ordered a "structured judgment" in respect of the plaintiff's future care costs. The Court explained that "[a] structured settlement becomes feasible because in this instance one of the defendant tortfeasors is the Government of Manitoba, and it provides permanency to what is now proposed" (*per* Huband J.A., at 223).

[3] S.O. 1984, c. 11.

[4] S.O. 1986, c. 4.

personal injury action or an action brought under Part V of the *Family Law Act, 1986* have three options: they may agree to a settlement of the action, providing for payment either by a lump sum or by means of a "structured settlement";[5] they may allow damages to be assessed by the court as a lump sum; or, pursuant to section 129 of the *Courts of Justice Act, 1984*, they may agree to allow the court to order periodic payment of the award of damages, which may also be subject to subsequent review and revision. We understand that there has been no recourse to the last of these alternatives, so that it appears to be more theoretical than real.

Section 129 of the *Courts of Justice Act, 1984* implemented certain recommendations made in the *Report of the Committee on Tort Compensation*, which was submitted in 1980 by a Special Committee of the Bench and Bar, chaired by Mr. Justice R. E. Holland.[6] The Special Committee had been appointed in response to comments by Mr. Justice Dickson, as he then was, of the Supreme Court of Canada, in favour of a system of periodic payments for future losses arising out of serious personal injury and wrongful death. In

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[5] A structured settlement is an agreement to settle an action out of court, under which the casualty insurer of the tortfeasor characteristically undertakes to make periodic payments in settlement of part of the plaintiff's claim by means of the purchase of an annuity that guarantees regular payments to the plaintiff. Often a structured settlement may include an initial lump sum payment in respect of pain and suffering and for other nonrecurring items of expense, such as medical expenses, past lost wages, and legal bills. The periodic payments may remain constant in amount or may increase, either annually or after a fixed duration, by a stipulated percentage designed to compensate for the effect of inflation. The terms of the agreement will vary according to the needs of the injured plaintiff.

The most important practical advantage of a structured settlement is that Revenue Canada permits the plaintiff to receive the payments under the annuity free from liability from taxation. Revenue Canada has established the attributes that a structured settlement must have in order to qualify for favourable treatment in Interpretation Bulletin IT-365R2, "Damages, Settlements and Similar Receipts" (May 8, 1987). See, generally, Weir, *Structured Settlements* (1984), and Baxter, "Structured Settlements—An Update", in LSUC Continuing Legal Education, *Personal Injury Damages: Current Law Under Attack* (May 24, 1986).

[6] Ontario, Special Committee of Bench and Bar, *Report of the Committee on Tort Compensation* (1980) (hereinafter referred to as "Holland Committee Report"). This Report is reproduced as Appendix 5 to this Report. The Special Committee was concerned, *inter alia*, about circumstances in which a plaintiff, while not mentally incompetent, was clearly incapable of managing a large sum of money. Rather than force proceedings to be brought under the *Mental Incompetency Act*, R.S.O. 1980, c. 264, to protect such a plaintiff, it was thought advisable to give the court a power to restrict the disposition of the award in such cases. Accordingly, the Special Committee also recommended that the Rules should provide that "[t]he court may, in its discretion, order a defendant to pay any part of a judgment sum representing the cost of future care of an injured plaintiff to the Public Trustee, the Accountant of the Supreme Court or such other person as the court may approve, to be invested on behalf of the plaintiff and paid out to or for the plaintiff at such times and in such circumstances as the court may order": see Holland Committee Report, at 26-27, reproduced *infra* at 275. This proposal was not implemented in the *Courts of Justice Act, 1984*.

Andrews v. Grand & Toy Alberta Ltd., Dickson J. had commented as follows:[7]

> The subject of damages for personal injury is an area of the law which cries out for legislative reform.... When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once-and-for-all award.
>
> The lump sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured person and the cost of meeting those needs.

In essence, the basic issue is whether the court should be given jurisdiction to award damages in the form of periodic payments, regardless of whether all affected parties consent, and to review these payments subsequently at the behest of either party. By no means are we pioneers in addressing this issue, for it has already been considered not only by the Special Committee of the Bench and Bar, but also by law reform bodies in other jurisdictions[8] and by various academic and other commentators.[9]

In the following section, drawing on the work that has preceded us, we shall review the policy arguments that have been offered in favour of and against a system of periodic payments. We shall then canvass the approaches that have been proposed or adopted in other jurisdictions. Finally, we shall

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[7] *Supra*, note 2, at 236. Similar comments were made by Dickson J. in the David B. Goodman Memorial Lectures, Faculty of Law, University of Toronto (November 13-15, 1979), reprinted as "The Role and Function of Judges" (1980), 14 L.S.U.C. Gazette 138, at 149-50.

[8] See, for example, England, The Law Commission, *Report on Personal Injury Litigation—Assessment of Damages*, Law Com. No. 56 (1973) (hereinafter referred to as "Law Commission Report"); United Kingdom, Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (Cmnd. 7054, 1978) (hereinafter referred to as "Pearson Report"), Vol. I; and Manitoba Law Reform Commission, *Report on Periodic Payment of Damages for Personal Injury and Death*, Report #68 (1987) (hereinafter referred to as "Manitoba Report").

[9] See, for example, Waddams, *The Law of Damages* (1983), paras. 325-50, at 188-99; Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at 9-11; Luntz, *Assessment of Damages for Personal Injury and Death* (2d ed., 1983), paras. 1.2.08-1.3.09, at 17-29; Feldthusen and McNair, "General Damages in Personal Injury Suits: The Supreme Court's Trilogy" (1978), 28 U. Toronto L.J. 381; Rea, "Lump-sum versus Periodic Damage Awards" (1981), 10 J. Legal Stud. 131; Bale, "Encouraging the Hearse Horse Not to Snicker: A Tort Fund Providing Variable Periodic Payments for Pecuniary Loss", in Steel and Rodgers-Magnet (eds.), *Issues in Tort Law* (1983) 91; and Bruce, "Four Techniques for Compensating Tort Damages" (1983), 21 U.W. Ont. L. Rev. 1.

state our own conclusions with respect to the adoption of a system of reviewable periodic payment of damages in Ontario.

2. THE ARGUMENTS FOR AND AGAINST PERIODIC PAYMENT OF DAMAGES

Various arguments have been presented in favour of adopting a system of periodic payments. For the most part, these arguments are directed to three concerns: improving accuracy of assessment; avoiding delays; and protecting plaintiffs who may dissipate their lump sum awards. We shall briefly discuss each of these themes.[10]

The major argument in favour of abandoning lump sum awards is that periodic payments will significantly enhance the accuracy of assessment of damages. The very nature of a lump sum award in respect of future losses, whether for cost of care or loss of earning capacity, virtually ensures that the damages will be an inaccurate measure of the plaintiff's loss, as the extent of the loss will depend on events that cannot be predicted with certainty.[11] As Dickson J. stated in *Andrews v. Grand & Toy Alberta Ltd.*, "[a]fter judgment new needs of the plaintiff arise and present needs are extinguished".[12] Nor are the uncertainties confined to the future medical condition of the plaintiff. Precise assessment may depend, as well, on economic or financial factors, relating to what the plaintiff would have earned in the future but for the injury and what she now will be able to earn in whatever remunerative activity she is capable of undertaking. While adjustments are made for contingencies to reflect the uncertainty of the plaintiff's future needs and future events, this process does not purport to ensure accuracy.

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[10] For more detailed discussion, see Waddams, *supra*, note 9, paras. 326-34, at 189-92; Luntz, *supra*, note 9, paras. 1.2.09-1.2.17, at 17-22; and Holland Committee Report, *supra*, note 6, at 4-9.

[11] With respect to the assessment of damages in a lump sum, the Pearson Report, *supra*, note 8, stated (paras. 557-58, at 122):

> 557 This process is inevitably inexact. The court must compare the plaintiff's expected income with the income which he might have enjoyed if he had not been injured. Allowance must be made for the likely duration of incapacity, and for the chances of promotion or increase in earnings; and, on the other hand, for the chances of loss of earnings, unemployment, unconnected illness or death. The court must also make assumptions about future economic conditions. In particular, it must make some assumptions about future rates of inflation, tax, and return on invested capital.
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> 558 None of these factors is certain. The plaintiff may live for a longer or shorter period than was assumed; his medical condition may improve or deteriorate unexpectedly; he may lose his job or fail to find another; or he may be unable to derive the hoped-for return on his investment. As a result, he may be extensively over compensated or under compensated.

See, also, Cooper-Stephenson and Saunders, *supra*, note 9, at 10, and Manitoba Report, *supra*, note 8, at 47.

[12] *Supra*, note 2, at 236.

Apart from the impossibility of predicting future developments, there are at least two other sources of inaccuracy, which have the effect of compounding the inaccuracy of the initial determination. First, where damages are awarded as a lump sum, the amount must be discounted to take account of the fact that the plaintiff receives the entire amount immediately. In other words, most of the award represents the plaintiff's future losses, and it is only the present value of that future loss to which the plaintiff is entitled. Some discounting factor must be applied to the award in order to take account of the plaintiff's ability to earn income by investing it, which in turn must take into account the effect of inflation.[13]

The second factor is that, since the plaintiff must pay income tax on the interest earned by the investment of the lump sum award, the award must be "grossed-up" in order to achieve true compensation.

A system of periodic payments, it is argued, would respond to these problems of accuracy. Regardless of whether the payments were subsequently reviewable, periodic payments would obviate the need to discount judgments and, assuming that Revenue Canada would accord favourable tax treatment to periodic payments, by analogy to its treatment of "structured settlements", the necessity for "gross-up" would vanish. If, furthermore, periodic payments were reviewable, flexibility would be introduced in the assessment of damages for future loss, and courts would be spared the difficult, if not impossible, task of estimating the plaintiff's future needs and predicting future developments. Payments could be adjusted to accommodate changing circumstances. Support for periodic payments is buttressed by the related argument that a plaintiff in fact does not suffer any loss until it actually occurs and "[p]erfect compensation, therefore, would be compensation of the plaintiff's actual losses as they accrued".[14]

A second series of arguments in favour of periodic payments relate to the view that a lump sum award encourages delay on the part of plaintiffs, both in bringing the action to trial and in commencing the process of rehabilitation. These arguments are clearly stated in the following excerpt from the Holland Committee Report:[15]

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[13] In Ontario, the discount rate is set by the Rules of Civil Procedure, O. Reg. 560/84, r. 53.09: see discussion *infra*, ch. 8, sec. 2. With respect to legislated discount rates, the Manitoba Law Reform Commission, *supra*, note 8, at 57, comments as follows:

> The elimination of the need to discount judgments for future losses would also result in greater accuracy. A discount rate is applied because the plaintiff is receiving monies now for losses that he will not incur until some point in the future. Though the implementation of a legislated discount rate [*The Judgment Interest and Discount Act*, S.M. 1986, c. 39, s. 9] results in consistency from case to case, the rate is nonetheless based on predictions of the long-term rate of return on investments and the long-term rate of inflation and may or may not be an accurate rate for the future.

[14] Waddams, *supra*, note 9, para. 326, at 190.

[15] *Supra*, note 6, at 5-7, reproduced *infra* at 262.

3. The Present System Causes Delay by The Plaintiff in Litigation

The argument here is that a once-and-for-all system of damage assessment compels the plaintiff to delay the trial as long as possible in order to gather the best possible evidence of the long-term effects of his injury. If the plaintiff knew that the assessment could be re-opened if unexpected complications ensued, he would have no incentive to delay: prompt trials would be in the interests of both parties and in the interests of the courts. Against this, however, must be set the costs of review procedures under any periodic payment system permitting subsequent adjustments.

4. The Present System Delays The Plaintiff's Rehabilitation

The argument is that because it will pay the plaintiff to prove at trial that his injuries are serious, he will not seriously attempt to rehabilitate himself before trial. Against this argument must be set the consideration that with a system of periodic payments liable to be reduced if the plaintiff regains health, the plaintiff will have an indefinite incentive against rehabilitation.

5. The Present System Deprives The Plaintiff of Compensation Immediately After The Accident when He May Need It Most

The delay caused by the once-and-for-all system (point 3, above) means that the plaintiff must do without compensation for months, and perhaps years, after the accident. Compensation at an early date is a humane provision to a seriously injured person and an important tool of rehabilitation. The force of this consideration has been significantly reduced in automobile accident cases by the scheme of 'no fault' benefits. The recent amendment to The Judicature Act providing for pre-judgment interest will also doubtless encourage insurers to make advance payments.

6. 'Compensation Neurosis'

A system of adjustable periodic payments would eliminate or reduce the anxiety and, hence, the deleterious effect on the plaintiff's mental health of his whole future support depending on a single proceeding.

7. The Present System puts Undue Pressure on The Plaintiff to Settle

As mentioned above in para. 5, the long delay before trial means that the plaintiff will not have full compensation for some time after the injury. The defendant is certain to take advantage of this need in settlement negotiations, and it will be an advantage taken at the expense of those least able to afford it (i.e. those plaintiffs whose need is the most pressing).

The third line of argument in favour of allowing the court to order periodic payments is that plaintiffs should be protected from the possibility of squandering their awards, an opportunity that arises particularly in the case of lump sum awards. Successful plaintiffs, it holds, often find themselves in sudden possession of an amount of money far greater than the amounts with which they are used to dealing. To manage such a sum properly requires considerable financial sophistication, and there is a risk

that a plaintiff—even the best intentioned plaintiff—will dissipate her award. No doubt this argument involves a certain paternalism, and raises a basic question as to whom the damages belong. However, to the extent that dissipation of the award may eventually cast the burden of supporting an injured plaintiff on the social welfare system, a general public interest may be said to inhere in this argument as well.

There are a number of arguments against periodic payments.[16] A principal argument is that, by its very nature, a system of reviewable periodic payments undermines the public interest in the final resolution of disputes.[17] Any system of payments that could be modified to respond to changing circumstances would involve increased costs to the courts, which would have to accommodate the burden of additional review proceedings, and to the parties, who would have to retain legal counsel and expert witnesses to appear on their behalf. Changing circumstances could comprehend not only alterations in the plaintiff's medical condition, but also economic and other changes that otherwise bear on the assessment of the plaintiff's loss.[18]

A second argument, allied to the first, is that, while a lump sum gives a plaintiff an incentive to rehabilitate herself, a system of periodic payments will have precisely the opposite effect. It is argued that, if the plaintiff is guaranteed regular payments that cover her actual losses, but only actual losses, there will be no incentive to rehabilitation. Successful rehabilitation will bring no financial reward because the damages award will be reduced accordingly.[19] The applicability of this argument must necessarily be confined to plaintiffs who are capable of rehabilitation, but who do not attempt efforts in that direction because their loss is securely met. For very severely

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[16] See, generally, Waddams, *supra*, note 9, paras. 335-47, at 192-98; Luntz, *supra*, note 9, paras. 1.2.18-1.2.28, at 22-28; and Holland Committee Report, *supra*, note 6, at 10-23, reproduced *infra* at 265-73.

[17] This interest is often articulated by the Latin maxim "*interest reipublicae ut sit finis litium*".

[18] With respect to the possibility of establishing a minimum prerequisite to review, as a means of addressing the potential burden inherent in allowing all periodic awards to be reconsidered, Waddams, *supra*, note 9, para. 337, at 193, argues as follows:

> The burden of rehearings might be reduced by setting some threshold requirement, for example, that only substantial changes in costs or in needs would be considered. Such a proposal raises considerable difficulties, however, in finding a satisfactory definition of 'substantial changes'. If the phrase is undefined, litigation will be required in each case to determine if a matter can be reopened. If defined, for example, in dollar or percentage figures, it will give rise to anomalies and injustice in depriving claimants of a variation where the change falls short of the specified figure, and a tendency to inflate claims in order to cross the threshold.

[19] It is important to note the following comments of the Holland Committee, *supra*, note 6, at 12, reproduced *infra* at 266:

> It is not necessary to support this argument with accusations of malingering. It is enough to say that, perhaps subconsciously, some claimants will tend to remain in a state of health that will be financially advantageous.

injured plaintiffs without any possibility of rehabilitation and those who are incapable of appreciating an incentive to rehabilitation—for example, a person who has suffered brain damage—the presence or absence of incentives is entirely irrelevant. It has also been observed "that malingering or its psychological equivalent has not proven an insuperable obstacle to periodic payments in social security schemes such as workers' compensation, or in schemes of disability insurance".[20]

A third argument, also related to loss of finality, is that, since an improvement in the condition of the injured plaintiff or an increment in her earnings would lead to a reduction of damages, a defendant or her insurer will have an incentive to scrutinize aspects of a plaintiff's private life.

Several arguments relate to what generally may be regarded as insurance concerns. It has been argued that, under the present tort regime, a system of reviewable periodic payments would create serious difficulties for insurers. The possibility of subsequent review of damage awards, it is said, would result in "open-ended liability", thereby preventing insurers from estimating losses with the degree of certainty necessary to calculate premiums accurately. The problem of open-ended liability is particularly acute with respect to the impact of inflation. While it is obvious that, unless periodic payments were fully indexed for inflation, plaintiffs would be inadequately protected, insurers object that they cannot give an open-ended guarantee against inflation.[21]

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[20] Waddams, *supra*, note 9, para. 340, at 194.

[21] In *The Law of Damages*, *supra*, note 9, para. 343, at 195, Waddams notes that "[i]n respect of inflation, the burden on the insurer could be made predictable by limiting cost of living increases to some standard measure of interest rates, such as the government treasury bill rate, or by a state-run insurance scheme of some sort".

The problem of open-ended liability could be met by a tort fund compensation system of the kind that has been proposed by certain commentators: see Bale, *supra*, note 9, and Feldthusen and McNair, *supra*, note 9. In essence, the tort fund could operate as a self-financing branch of the Workers' Compensation system. General damages assessed by the court would be paid into the fund as a lump sum by the defendant, whose involvement would then cease. The fund would provide to the plaintiff income-replacement and health care benefits, which would be variable according to both changes in need and, in the case of income replacement, changes in the average industrial wage. Such a fund, however, would require government participation to guarantee against shortfall.

Moreover, settlement may be a problem. It has been suggested that, given the relatively small number of claims resulting in large personal injury awards, and the much greater number of settlements, the viability of the fund might well depend on including as participants plaintiffs who have opted to settle. The difficulty here is that there would be an incentive for the parties to settle at a low figure, discharging the defendant, and giving the plaintiff a lifetime claim on the fund. It would appear to be necessary, therefore, for the fund to be represented in all settlement negotiations, and to have a power to disallow any settlement that it considered unreasonably low. This would seem to create difficulties, and might force parties into litigation against the wishes of both of them.

A second insurance-related argument is that periodic payments would constitute a heavy burden for uninsured or underinsured defendants. Underinsurance is now very common in automobile cases, and the prospect of imposing on an individual, who may not have been personally at fault, not only the loss of all his wealth, but also an ever increasing series of payments that would amount to a permanent mortgage on his lifetime earning capacity appears to be draconian.[22] If indexed fully against inflation, what began as a reasonably modest annual payment could become an enormous sum over time.

There are other arguments against periodic payments. For example, it has been said that allowing the court to order periodic payments, regardless of the wishes of the parties, denies plaintiffs the result they would prefer. Unless private settlement of actions for lump sums were forbidden, plaintiffs could simply evade a compulsory system of periodic payments by settling the action. It is also argued that, with the spectre of periodic payments looming over the negotiations, the bargaining position of plaintiffs inevitably would be weakened, for the price of securing agreement would be assent to a lesser lump sum than would have been realized under the existing system.[23]

Finally, certain practical difficulties with the implementation of a periodic payments scheme have been identified. Among the several difficulties that have been raised are the necessity for the defendant to provide adequate security in order to ensure continuing payment and the assignability of the plaintiff's periodic payments.[24]

3. APPROACHES IN OTHER JURISDICTIONS

As indicated in the introduction to this chapter, the subject of periodic payments has received the attention of law reform bodies and legislatures in other jurisdictions. In this section, we shall briefly canvass various approaches that have been taken to this issue.

(a) Manitoba

The most recent consideration of periodic payments can be found in *Report on Periodic Payment of Damages for Personal Injury and Death*,[25] a

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[22] Moreover, it is doubtful whether bankruptcy would offer any relief in the case of an obligation that accrued periodically. In the Pearson Report, the Minority Opinion on Periodic Payments commented that "[t]o convert a plaintiff into a pensioner of the defendant throughout the period of disability is an innovation which cannot be desirable even if practicable": Pearson Report, *supra*, note 8, para. 621, at 135.

[23] Waddams, *supra*, note 9, paras. 342 and 346, at 194 and 196-97.

[24] *Ibid.*, para. 347, at 197-98, where several other difficulties are discussed briefly.

[25] Manitoba Report, *supra*, note 8.

March, 1987 Report of the Manitoba Law Reform Commission, which was undertaken in response to a Reference from the Attorney General of Manitoba.

The basic recommendation in the Report is that "legislation be enacted to authorize the courts to award damages for personal injury or death by way of periodic payments".[26] In making this proposal, the Manitoba Law Reform Commission sought to address three problems: the inherent inaccuracy of lump sum awards; the large size of damages awards; and "money management", that is, concern over the possibility that plaintiffs may dissipate lump sum damages awards.

The Manitoba Law Reform Commission did not recommend that periodic payments be made subject to review. The Commission rejected a system of reviewable payments because of the loss of finality, the additional burden and expense that would be placed on the courts and the parties, and the difficulties that would be faced by insurers, the last of which, it suggested, would necessarily lead to increased costs that would be reflected in higher liability insurance premiums.[27] The Commission was of the view that further study would be necessary before it could propose a reviewable system.[28] The Commission did acknowledge, however, that merely providing for periodic payments would preserve a "major element of inaccuracy"[29] and would not alleviate the problem of delay.

The Manitoba Law Reform Commission made more than twenty recommendations dealing with various aspects of periodic payments. We shall mention only the most significant of them.

The Commission recommended that no restriction should be placed either on the types of case in which courts may grant damages in the form of periodic payments or on the heads of damage in respect of which periodic payments may be ordered.[30] The Commission further recommended that the decision to order periodic payments should rest entirely in the discretion of the court, and expressly rejected systems under which the jurisdiction to do so depends on the preference of either party, or both of them.[31]

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[26] *Ibid.*, at 63.

[27] *Ibid.*, at 65-66.

[28] The Manitoba Law Reform Commission also considered a scheme of provisional damages, such as that recommended by the English Law Commission (see Law Commission Report, *supra*, note 8), and later enacted by the *Administration of Justice Act 1982*, c. 53 (U.K.), s. 6, as well as the possibility of interim damages: see Manitoba Report, *supra*, note 8, at 67-68. As with reviewable periodic payments, its view was that further study was necessary before either of these alternatives could be endorsed.

[29] *Ibid.*, at 63.

[30] *Ibid.*, at 74-79.

[31] *Ibid.*, at 79-83. It was further recommended that "the legislation authorizing the awarding of damages by periodic payments contain neither guidelines for the exercise of the court's discretion nor a preamble as to the legislation's purpose": *ibid.*, at 85.

With respect to the important question of securing future payments, the Commission made several proposals. The basic recommendation was that adequate security for an award of periodic payments should be posted by or on behalf of the defendant, unless the court determined otherwise. The Report proposed further that "security be in the form of an annuity contract issued by a life insurer satisfactory to the court or in any other form of security satisfactory to the court".[32]

With respect to the impact of inflation, the Commission recommended that, rather than allow courts to determine the inflation rate on a case-by-case basis, "all judgments awarding damages by periodic payments provide that the amount of the periodic payments shall increase over time in recognition of inflation at a rate specified in the legislation".[33] The specified rate of inflation, it was proposed, should reflect the long-term rate of inflation in Canada, and should not be varied to take account of short-term changes in inflation. The Commission further recommended that the specified rate of inflation, to be established in consultation with the life insurance industry, should be based on the long term trend of the *Consumer Price Index for Canada, All items (Not Seasonally Adjusted)*.[34]

In addition to the foregoing matters, the Commission considered whether a plaintiff who receives periodic payments should be allowed to convert or commute them into a lump sum, whether the right to periodic payments should be assignable, and the form that a judgment should take.[35]

(b) England

(i) The Law Commission

In its 1973 Report on the assessment of damages in personal injury litigation,[36] The Law Commission rejected the introduction of periodic payments. In an earlier Working Paper,[37] The Law Commission had expressed the view that it would favour periodic payments as an optional alternative to lump sum awards unless consultation revealed that an obligatory scheme was widely demanded.

According to the 1973 Report, the ensuing consultation indicated "that the introduction of a system of periodic payments would meet with vehe-

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[32] *Ibid.*, at 90.

[33] *Ibid.*, at 101.

[34] *Ibid.*, at 101-06.

[35] *Ibid.*, at 90-99 and 106-10.

[36] Law Commission Report, *supra*, note 8.

[37] England, The Law Commission, *Personal Injury Litigation—Assessment of Damages*, Working Paper No. 41 (1971).

ment opposition from almost every person or organisation actually concerned with personal injury litigation".[38] Furthermore, The Law Commission was of the view that periodic payments would be used only rarely unless they were introduced as a replacement for a lump sum award, rather than merely as an optional alternative. Against this background, The Law Commission concluded that "[w]hatever merits periodic payments would have within a different system of compensation for injury, we are satisfied that, in a fault based system, it would not be worth while introducing periodic payments".[39]

(ii) Royal Commission on Civil Liability and Compensation for Personal Injury ("Pearson Commission")

In 1978, the Royal Commission on Civil Liability and Compensation for Personal Injury, chaired by Lord Pearson, published its Report. The Report dealt with numerous issues, including the question of periodic payments.

The Pearson Commission recommended that damages for past pecuniary loss and for non-pecuniary loss should continue to be awarded as a lump sum.[40] On the question of whether periodic payments should be awarded in respect of future pecuniary loss, the Commission was divided. The majority favoured the introduction of a system of periodic payments, while a minority preferred retention of the lump sum award.

The majority recommended that, in the case of future loss caused by death or serious and lasting injury, the court should be required to order damages in the form of periodic payments, unless it is satisfied, on the application of the plaintiff, that a lump sum award would be more appropriate.[41] Where injuries are not serious or lasting, it was proposed that the court should have a discretion to award damages in the form of periodic payments for the loss.[42]

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[38] Law Commission Report, *supra*, note 8, para. 27, at 10.

[39] *Ibid.*, para. 29, at 10.

[40] Pearson Report, *supra*, note 8, paras. 550-52 and 612-14, at 121 and 132-33. With respect to non-pecuniary loss, the Commission stated (para. 612, at 132):

> 612 We do not think that the arguments in favour of periodic payments apply with equal force to damages for non-pecuniary loss. Such damages are an arbitrary acknowledgment of an essentially unquantifiable loss. They are not intended to provide financial support; and we do not think there is the same need to take account of post-trial changes. Indeed, there is no rational basis for saying whether a particular award represents over compensation or under compensation, except by comparison with other awards.

[41] *Ibid.*, paras. 574-76, at 125.

[42] *Ibid.*, para. 580, at 126.

Several advantages were cited in support of periodic payments in serious cases. First, the plaintiff would be more closely restored to her original position. Secondly, if reviewable, periodic payments would allow adjustments to take account of later changes. Thirdly, there would be tax advantages. Fourthly, "other compensation received by the plaintiff could be more accurately offset from damages if the damages were awarded in the form of periodic payments".[43] Finally, the Commission noted the view, expressed by the Royal College of Physicians and Surgeons of Glasgow, that the advantages of periodic payments in relieving financial anxiety outweighed the risk that they would prolong incapacity.[44]

On the question of the reviewability of periodic awards, the majority recommended that the payments should be subject to review, but only in respect of changes in the plaintiff's medical condition that affected the amount of her pecuniary loss.[45]

With respect to financial changes, the majority made recommendations designed to protect plaintiffs against the effect of inflation. First, it recommended that "periodic payments should be revalued annually in line with the movement of average earnings".[46] Secondly, having concluded that some form of government involvement would be necessary if the scheme were to be inflation proof, it recommended that the periodic payments provided by insurance be financed by a fixed escalation scheme.[47]

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[43] *Ibid.*, para. 570, at 124.

[44] See, generally, *ibid.*, paras. 566-71, at 124.

[45] *Ibid.*, paras. 586-91, at 128-29.

[46] *Ibid.*, para. 600, at 130.

[47] It explained the scheme as follows (paras. 605-06, at 131):

> 605 The third possibility had a precedent in the contracting out provisions of the new state pensions scheme. Insurers would undertake to provide periodic payments escalating at one of two fixed rates (at present 5 per cent and 8 1/2 per cent). If the lower rate was chosen, the insurer would also pay a 'limited revaluation' premium to the Government. In return, the Government would supplement the payments in order to provide full inflation proofing in years when the inflation rate exceeded the fixed escalation. If the higher rate was chosen, the Government would again supplement the payments if necessary, but, in years when the inflation rate was lower than the fixed escalation, the Government would have the benefit of the difference. In either case, there would be an agreed minimum period of notice before the escalation rate could be changed.
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> 606 We decided...in favour of the fixed escalation scheme. Apart from its relative simplicity this scheme would have the advantage of following an established precedent. It is also the only one of the three options which could provide an equal chance of the Government making a profit or a loss. At the same time, the funds required to pay tort compensation would remain substantially in private hands, in keeping with the role of tort as a private remedy. There would be no need for insurers to make provision for meeting inflation proofed liabilities of uncertain extent.

As indicated, a minority of the Pearson Commission rejected the introduction of periodic payments, and favoured continuation of the assessment of lump sum awards for damages in tort. While the minority acknowledged that the arguments presented by the majority in favour of periodic payments did have force, it did not consider them to be sufficiently weighty to justify the proposed "radical" change.

In support of its own position, the minority advanced a number of arguments,[48] several of which will be mentioned here. The minority noted that "there is opinion evidence ... that periodic payments tend to destroy initiative and produce lack of incentive towards rehabilitation".[49] While it agreed that a system of periodic payments must include a review procedure, the minority regarded this as "an undesirable continuation of the adversarial process and relationship which is not in the plaintiff's best interests".[50] Concern was expressed also about the position of the defendant, the amount of whose ultimate liability would be uncertain. The minority commented that "[t]o convert a plaintiff into a pensioner of the defendant throughout the period of disability is an innovation which cannot be desirable even if practicable".[51]

Another reason given for the rejection of a system of periodic payments was that it would increase administrative costs for defendants and insurers, and legal costs for the parties.[52]

The minority conceded that lump sum awards for future loss could not result in exact compensation, due to uncertainties about future developments, but stated that this did not become "a cause of serious complaint, until the comparatively recent onset of inflation, the failure of the law to recognize and make allowances for its effect, and the very high incidence of liability to tax on the income from invested damages".[53] Its view was that the objective of full compensation would be better achieved by adopting the Report's recommendations respecting the impact of inflation on damage assessment than by introducing periodic payments.[54]

Apart from the foregoing practical objections, the minority preferred lump sum awards as a matter of principle, as the following passage makes clear:[55]

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[48] *Ibid.*, paras. 621-29, at 134-36.

[49] *Ibid.*, para. 620, at 134.

[50] *Ibid.*, para. 621, at 135.

[51] *Ibid.*

[52] *Ibid.*, para. 626, at 135.

[53] *Ibid.*, para. 627, at 135-36.

[54] *Ibid.*

[55] *Ibid.*, para. 628, at 136.

628 Further and in any event we do not believe that it is right to take away from a plaintiff his entitlement to receipt of the whole of his damages from a defendant in the form of a lump sum awarded by the court on trial and to compel him—against his will—to accept a series of periodic payments in its place.

(c) AUSTRALIA

Legislation providing for periodic payments has been enacted in two Australian states.[56] In 1966, with the enactment of the *Motor Vehicle (Third Party Insurance) Act Amendment Act, 1966*,[57] Western Australia became the first jurisdiction in the common law world to depart from the lump sum award of damages.[58] The following year, the *Supreme Court Act, 1935-1966* was amended in South Australia to confer authority on the courts to order periodic payments.[59]

Under the Western Australia *Motor Vehicle (Third Party Insurance) Act, 1943*,[60] the court[61] has power to order payment of damages by way of lump sum or periodic payments, or both, in claims for death or bodily injury caused by, or arising out of, the use of a motor vehicle. Periodic payments may be ordered for whatever period the court determines. At any time, the court, either acting on its own motion or an application of a party, may review the payments and order them to be varied or terminated. Apparently, periodic payments have been ordered rarely under the legislation.[62]

Pursuant to section 30b of the South Australia *Supreme Court Act, 1935-80*, in an action for damages, the court may make a declaratory order on the issue of liability and postpone the determination of damages. Where such an order is made, the court may order interim payments on account of damages. In addition to, or instead of, an order for interim payment, the

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[56] See, generally, Luntz, *supra*, note 9, paras. 1.3.01-1.3.09, at 29-35.

[57] No. 95 of 1966, s. 15.

[58] In non-common law jurisdictions, damages by way of periodic payments may be ordered: see, generally, Fleming, "Damages: Capital or Rent?" (1969), 19 U. Toronto L.J. 295.

[59] *Supreme Court Act Amendment Act (No. 2), 1966-1967*, No. 21 of 1967, s. 4.

[60] No. 32 of 1943, s. 16(4), as en. by No. 42 of 1972, s. 6.

[61] Originally, the power to order periodic payments had been given to a special motor claims tribunal, known as the Third Party Tribunal. In 1972, on its abolition, the power was conferred on the court: see *Motor Vehicle (Third Party Insurance) Act Amendment Act, 1972*, No. 42 of 1972.

[62] New South Wales Law Reform Commission, *Report on a Transport Accidents Scheme for New South Wales*, LRC No. 43 (1984) (hereinafter referred to as "New South Wales Report"), Vol. 1, para. 4.6, at 82. In the first 15 years of the Act's operation, only 33 orders for reviewable periodic payments were made: see Luntz, "Damages for Personal Injury: Rhetoric, Reality and Reform from an Australian Perspective" (1985), 38 Current Legal Probs. 29, at 34.

court may order periodic payments for a fixed period or until a further order. On the application of any party, periodic payments may be varied or terminated by the court.[63]

Unlike the Western Australia legislation, the availability of periodic payments is not confined to compensation for motor vehicle accidents, but extends to all actions that may be brought in the Supreme Court. There is, however, a limitation as to the heads of damage. Interim payment in respect of non-pecuniary loss is not permitted, except in certain, specified cases.[64]

As in Western Australia, the power to order periodic payments has been exercised only rarely.[65] In neither Western Australia nor South Australia has there been any study of the reasons why there has been so little recourse to periodic payments.[66]

4. CONCLUSIONS

We have considered carefully the arguments for and against the introduction of a system of reviewable periodic payments and the approaches to reform that have been suggested or taken in other jurisdictions. On balance, a majority of the Commission[67] has concluded that the law in Ontario should not be changed to accommodate such a system. In the remainder of this chapter, we shall outline the reasons for this decision.

Before doing so, however, we wish to explain briefly why we did not accept the alternative, recommended recently by the Manitoba Law Reform Commission, to institute a system of *nonreviewable* periodic payments.[68] First, we do not believe that the Manitoba scheme addresses adequately the problem of inflation. Although awards would be adjusted

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[63] Where the court has postponed the determination of damages, any party may apply for a final assessment of damages. In an action for personal injury, where such an application has been made, the judge must undertake a final assessment where the plaintiff's medical condition has stabilized, or where a period of four years has elapsed since the original declaratory judgment. However, even where these conditions are met, a final assessment may be refused if the judge is of the view that there are special circumstances that justify continuing postponement of that assessment: see *Supreme Court Act, 1935-80*, s. 30b(6), as en. by No. 21 of 1967, s. 4.

[64] *Ibid.*, s. 30b(2).

[65] New South Wales Report, *supra*, note 62, para. 4.7, at 83.

[66] *Ibid.* Professor Veitch suggests that the South Australia changes have "not found favour with the legal profession, the bench or litigants", because they fail to affect significantly three key problems of the tort system—delay, inexactitude of assessment and cost: see Veitch, "Cosmetic Reform: Periodic Payments and Structured Settlements" (1981-83), 7 U. Tasm. L. Rev. 136, at 144.

[67] Dr. H. Allan Leal, O.C., Q.C., the Vice Chairman of the Commission, dissents from this view: see *infra*, this ch., sec. 5.

[68] Manitoba Report, *supra*, note 8.

annually for inflation, the amount of increase would be fixed at the date of judgment based on the anticipated long-term rate of future inflation, and no subsequent adjustment would be possible to take account of the actual inflation rate. This could result in undercompensation or overcompensation should the actual inflation rate not equal the stipulated rate of increase. Secondly, by not providing for the review of periodic payments, the Manitoba proposal fails to offer the benefits extolled by Mr. Justice Dickson in *Andrews v. Grand & Toy Alberta Ltd.*[69]—that is, accuracy of assessment and the ability to respond to changes in circumstances. Indeed, the Manitoba Law Reform Commission itself conceded that its scheme would involve a "major element of inaccuracy".[70]

Turning then to the main question of whether a system of reviewable periodic payments should be instituted in Ontario, it was the Commission's view that the arguments favouring such a scheme were least tenable in relation to claims for loss of earning capacity. To date, calculations of lost earning capacity in cases of injury and death have not caused insuperable problems for the courts; nor have they resulted in very large awards.[71]

Moreover, it was in respect of loss of earning capacity that the arguments against introducing a system of reviewable periodic payments appeared strongest, particularly the argument that such a system would create an incentive for the injured person to remain disabled.[72] We were also concerned that imposing periodic payments on an unwilling plaintiff would be inconsistent with our acceptance of the fundamental principle that the loss of working capacity involves the loss of a capital asset, to which a value may be assigned.[73] A plaintiff should be able to choose a capital sum as compensation, which she could then invest, at her discretion, in order to generate a flow of income.

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[69] *Supra*, note 2, at 236.

[70] Manitoba Report, *supra*, note 8, at 63.

[71] Several reasons explain why the assessment of loss of earnings has not resulted in particularly large awards. In the first place, in non-fatal cases, there is no deduction for income tax (see *supra*, ch. 2, sec. 7(a)) and hence there is no gross-up of the award. In most non-fatal cases, the loss is a partial loss of earning. Generally speaking, the calculation of the loss is based on the average national wage in Canada, an amount that is often greatly exceeded by the cost of care on an annual basis.

[72] With respect to this argument, it is useful to distinguish between payment of medical costs, and payment of lost earnings. In respect of medical costs, and other costs of care, the incentive to incur unnecessarily heavy costs would not, it would seem, be very great under a system where the plaintiff did not have the right to receive more than a reimbursement (or direct payment to the supplier) of costs actually incurred. There would be some incentive to choose more expensive and comfortable methods of care and treatment, particularly where items were in question that contributed to the plaintiff's comfort and amenities, but the opportunity for such choices would be limited. On the other hand, in respect of lost earnings, there might well be a serious problem.

[73] See *supra*, ch. 2, sec. 5(b).

Accordingly, we concluded that reviewable periodic payments should not be introduced in respect of loss of working capacity.

The policy arguments favouring a system of reviewable periodic payments are considerably stronger in relation to awards for future care, so far as concerns that portion of the cost of care that is not met by the Ontario Hospital Insurance Plan.[74] It is in this area that uncertainties concerning future eventualities have posed major difficulties for the courts, leading to calls for reform.

For this reason, the Commission gave serious consideration to the possibility of recommending a scheme[75] for the periodic payment of costs of future care. While, for reasons that are outlined below, the Commission ultimately rejected this scheme, it will be useful to describe briefly its main features and advantages. Under the scheme, an insurer, or a corporation that has been approved as a self-insurer, on satisfying the Superintendent of Insurance of adequate reserves, would be permitted, before or after judgment, to elect to satisfy the future care portion of a lump sum award by undertaking to pay the plaintiff's actual reasonable costs as they arose.[76] We

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[74] With respect to O.H.I.P., the Holland Committee Report, *supra*, note 6, at 15, reproduced *infra* at 268, explains as follows:

> Since O.H.I.P. is subrogated to the portion of the claim for future medical expenses that fall within the coverage of the health insurance scheme, there can be no question of the plaintiff dissipating this portion of the award or of the plaintiff being over-compensated or under-compensated, since he will receive what he needs from O.H.I.P.—no more and no less. It would be most inconvenient, therefore, to contemplate periodic reviews of this portion of the award, and very wasteful to conduct reviews to adjust accounts between O.H.I.P. and the defendant's insurer according to changes in the plaintiff's state of health. It would be even more anomalous to contemplate such reviews in the case of an uninsured defendant. All consideration seem to point to the advantages of a lump sum settlement in favour of O.H.I.P.

[75] This proposal is a modest version of a scheme that has been proposed for the United States by Professor O'Connell: see O'Connell, "Offers That Can't Be Refused: Foreclosure of Personal Injury Claims by Defendants' Prompt Tender of Claimants' Net Economic Losses" (1982), 77 Nw. U.L. Rev. 589; Moore and O'Connell, "Foreclosing Medical Malpractice Claims By Prompt Tender of Economic Loss" (1984), 44 La. L. Rev. 1267; and O'Connell and Kelly, *The Blame Game* (1987). His proposal, however, applies not only to costs of care, but also to loss of income, in respect of which he recommends that a ceiling on recovery be imposed. In addition, his scheme would deprive the plaintiff entirely of her claim for non-economic loss. Undoubtedly, these features will attract opposition from the American plaintiffs' bar. In the Canadian context, where awards for non-pecuniary loss and for loss of earning capacity are moderate and reasonably predictable, there seems to be no need to interfere with the plaintiff's present rights in respect of these heads of damage. Consequently, the alternative that we considered was confined to the cost of future care.

[76] The casualty insurer would be able to take advantage of "sub-standard mortality annuities" (that is, annuities at favourable rates based on a life insurer's judgment that—as is said often to be the case—the actual life expectancy of a seriously injured person will be shorter than that on which judicial awards are based). We have been informed that life insurers compete for this business, which tends to drive the prices of such annuities down.

understand that, under the Michigan no-fault automobile insurance plan, insurers undertake to pay, without limit, actual medical and rehabilitative costs for a person's life.[77]

Under the scheme, on the giving of such an undertaking, the plaintiff's claim would abate accordingly. While the plaintiff would lose the right to a lump sum assessment of this head of damage, this would occur only on receipt of an adequate alternative, that is, a guarantee of having her actual costs met as they arise.

From the perspective of defendants, such a scheme would go a long way to meeting the objections of insurers and others that extravagant sums are awarded for costs of care that in fact are never spent for their intended purpose, and that the gross-up for income tax is excessive. An insurer who was dissatisfied with an actual or prospective award on such grounds would have the option of paying the actual costs as they arose. The objection to excessive gross-up would be met, as the gross-up element in the award would not be payable if the insurer elected to undertake periodic payments on this basis and if Revenue Canada were to accord to periodic payments the preferential tax treatment that is extended to structured settlements.[78]

In the case of an insurer whose liability was subject to a limit, the insurer could undertake to pay the actual costs as they arose up to the limit. The costs, as they were incurred, would be discounted to their value at the date of the undertaking. Thus, the plaintiff would always know the balance remaining in her account, and could govern her conduct accordingly in making claims.

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[77] The Michigan Insurance Code of 1956, Mich. Comp. Laws Ann. § 500.3107, provides, in part, as follows:

> § 500.3107. Personal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation....

Section 500.3110(4) provides that "personal protection insurance benefits payable for accidental bodily injury accrue not when the injury occurs but as the allowable expense...is incurred". Finally, § 500.3142(1) provides that "personal protection insurance benefits are payable as loss accrues".

Under the Michigan no-fault scheme, there is no limit on the benefit for medical and rehabilitation expenses. Where, however, the victim's total loss in respect of personal injury protection claims—which includes work loss—exceeds $250,000, the amount paid by an insurer in respect of the excess is indemnified by the Michigan Catastrophic Claims Association (MCAA). All Michigan auto insurers are members of the association; each must contribute its *pro rata* share, based on the number of cars insured, to cover the association's cost. The MCAA was created because insurers had objected that "unlimited rehabilitation and medical benefits...imposes an excessive and unfair burden on small insurance companies that happen to have insured a person who suffers a catastrophic injury": see Ontario, *Final Report of the Ontario Task Force on Insurance* (1986), Appendix 14, at 341.

[78] See *supra*, note 5.

In giving judgment in a personal injury action, the judge would be empowered to specify what level and kind of care should be provided, and any undertaking given would be for the provision of that level and kind of care, unless a material change in circumstances after the date of the judgment were proved. This would, in part, address the problem of disputes arising with respect to the reasonableness of expenses and with respect to whether they were caused by the injury.

Notwithstanding the advantages of such a scheme, however, we were not persuaded in the end that the benefits outweighed the costs. In the first place, we had serious reservations about whether the scheme would be attractive to Ontario insurers. We doubted whether insurers would wish to undertake to pay, without limit, the cost of care for the duration of an injured person's life—a cost that could be potentially enormous.[79] In this respect, it is significant that, while the Submission of the Insurance Bureau of Canada to the Inquiry into Motor Vehicle Accident Compensation in Ontario endorsed a modified no-fault automobile plan that draws on the Michigan no-fault scheme, it proposed limits on the benefits for long-term care.[80]

Secondly, we were concerned that such a scheme could work to the serious disadvantage of plaintiffs in cases where the amount awarded at trial equals or exceeds the insurance limit. In such circumstances, insurers, faced with the choice of a lump sum payment or periodic payments, would invariably choose the latter; for, if the plaintiff were to die early, the obligations of the insurer would cease and the insurer, rather than the plaintiff's estate, would reap the financial benefit of the premature death. Even if the plaintiff were to survive to her full life expectancy, the periodic payments payable by the insurer would reach the limit and be exhausted prior to the plaintiff's death. In such a case, it would be preferable for the plaintiff to receive a lump sum payment, thereby allowing her the flexibility to arrange her care as best she can in light of the anticipated shortfall.

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[79] The potential cost of such an undertaking is illustrated by *MacDonald v. Travelers Indemnity Co. of Canada* (1987), 60 O.R. (2d) 385 (H.C.J.), which is discussed *supra*, ch. 4, sec. 2(b).

We note that, under the Michigan no-fault system, where the total loss of a victim exceeds $250,000, individual insurers are indemnified under a re-insurance scheme for payments in excess of that amount: see discussion *supra*, note 77.

[80] See Insurance Bureau of Canada, *Submission to The Hon. Mr. Justice Coulter A. Osborne* (April, 1987), at 12. Under the IBC's plan, benefits would be provided up to $200,000 for long term care "where the injured person is not capable of performing tasks necessary to sustain an independent lifestyle". The Submission (*ibid.*) states that indemnity would be limited to the lesser of

(i) the monthly cost of group residence appropriate for the needs of the insured, or

(ii) the monthly cost of long term care not exceeding 12 hours per day.

Our major concern, however, was the lack of finality inherent in the proposal. Because subsequent disagreement about the standard of care could not be avoided entirely, the system would involve the continuation of an adversarial relationship between the plaintiff and the defendant or her insurer. Inevitably, plaintiffs would be in the position of supplicants and, regardless of how carefully designed, the scheme would see them at a psychological and possibly financial disadvantage in seeking adjustments in their favour. Apart from a concern for injured plaintiffs, we saw the introduction of a potential for disputes on a continuing basis as adding an undesirable burden to an already strained court system.

While we have rejected a scheme of reviewable periodic payments, it should be noted that the parties will be able to agree to periodic payments under section 129 of the *Courts of Justice Act, 1984*. We note also that one of the problems that the introduction of periodic payments is designed to address would be ameliorated by recommendations that we have made in chapter 4 of this Report dealing with gross-up.[81] Finally, we observe that little recourse has been made to periodic payments in both Western Australia and South Australia.

The Commission therefore recommends that the law of Ontario should not be changed to accommodate a system of reviewable periodic payments that could be ordered by the court without the consent of the parties.

5. STATEMENT OF DISSENT AND EXPLANATION BY H. ALLAN LEAL, O.C., Q.C.

In the *Andrews* case in 1978, Dickson J. (as he then was) in delivering the judgment of the Supreme Court of Canada said:

> The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing [at the present level of decision the *McErlean* case is surely one of these]. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once-and-for-all award.
>
> The lump sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care and a long-term lack of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured person and the cost of meeting those needs. In making the comment I am not unaware of the

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[81] *Supra*, ch. 4, sec. 3(d).

negative recommendation of the British Law Commission (Law Com. 56—*Report on Personal Injury Litigation—Assessment of Damages*) following strong opposition from insurance interests and the plaintiffs' bar.

The apparent reliability of assessments provided by modern actuarial practice is largely illusionary, for actuarial science deals with probabilities, not actualities. This is in no way to denigrate a respected profession, but it is obvious that the validity of the answers given by the actuarial witness, as with a computer, depends upon the soundness of the postulates from which he proceeds. Although a useful aid, and a sharper tool than the 'multiplier-multiplicand' approach favoured in some jurisdictions, actuarial evidence speaks in terms of group experience. It cannot, and does not purport to, speak as to the individual sufferer. So long as we are tied to lump-sum awards, however, we are tied also to actuarial calculations as the best available means of determining amount.

In spite of these severe difficulties with the present law of personal injury compensation, the positive administrative machinery required for a system of reviewable periodic payments, and the need to hear all interested parties in order to fashion a more enlightened system, both dictate that the appropriate body to act must be the Legislature, rather than the Courts. Until such time as the Legislature acts, the Courts must proceed on established principles to award damages which compensate accident victims with justice and humanity for the losses they may suffer.

In *Andrews* and the remaining two cases of the trilogy, *Thornton v. School District No. 57 (Prince George)* and *Arnold v. Teno* the Supreme Court proceeded to rationalize and restate the principles governing compensation under the tort regime but, for the reasons given by Dickson J., did nothing to advance the reform of the system and the statement quoted above remains a *cri de coeur* and not a blueprint for action. In its current project the Ontario Law Reform Commission is under no such strictures and, indeed, is under a heavy burden to recommend such reforms as will alleviate the difficulties and obstacles of the present tort regime on damage compensation which are visited upon us by the imperfections of that system.

It is true that following the trilogy of cases and other studies the Ontario Legislature moved to confer statutory jurisdiction on the courts to order periodic payment of damage awards. The *Courts of Justice Act, 1984*, S.O. 1984, c. 11, s. 129, reads as follows:

129. In a proceeding where damages are claimed,

(a) for personal injuries; or

(b) under Part V of the *Family Law Reform Act*, for loss resulting from the injury to or death of a person,

the court may, with the consent of all affected parties,

(c) order the defendant to pay all or part of the award for damages periodically on such terms as the court considers just;

(d) order that the award for damages be subject to future review and revision in such circumstances and on such terms as the court considers just.

Although it is perhaps too early at this stage to pass final judgment on the ameliorative effect of these provisions, since serious injuries involved in most current cases were suffered prior to 1984, it is an educated guess that the section will prove to be a dead letter because its application expressly requires the consent of all affected parties. Disagreement is the stuff of litigation and it would appear to be asking too much that its terminal process be made the subject of unanimity.

My colleagues on the Commission have recommended that the law of Ontario should not be changed to accommodate a system of reviewable payments. It is a matter of regret that the Report of the Manitoba Law Reform Commission of March, 1987 on Periodic Payment of Damages for Personal Injury and Death was not received in time to permit a full discussion of its recommendations before this initial decision was taken. In fact, the Manitoba recommendation is that, as a first step, non-reviewable periodic payments be ordered in an award of damages for personal injury or death. Their Commission was of the view that further study would be necessary before it could propose a reviewable system. In a subsequent decision my colleagues also rejected the proposal for the acceptance of the principle of non-reviewable awards. I personally regret that I cannot agree with my colleagues on this issue. My first preference would be to recommend that legislation be passed authorizing, in proper cases, an award to be made in the form of reviewable periodic payments, particularly in the area of future care compensation. This would not be a replacement for a lump sum award in all cases nor, indeed, on all items of loss in any given case. My preference is strong for this principle because it avoids many, if not all, of the difficulties and highly undesirable consequences of lump sum, once-and-for-all awards. This, of course, would include the elimination of any necessity for an additional sum to cover tax liability on any income which the investment of the lump sum generates. It will be obvious from the current report that much time and energy were devoted to an attempt to rationalize the "gross-up" factor in lump sum awards. If the federal tax authorities were prepared to grant the same dispensation to periodic payment awards (reviewable or non-reviewable), as they do to structured settlements at present, there would be no necessity to even consider the tax generated aspects of lump sum awards.

My alternative recommendation would be, and here I would adopt the final recommendation of the Manitoba Commission, to authorize through legislation the award, in proper cases, of compensation in the form of non-reviewable periodic payments. The Manitoba Commission, in a thorough and scholarly way, has canvassed all the reasons why lump sum awards are unsatisfactory and demonstrated how the alleged problem areas of non-reviewable periodic payments can be resolved. They acknowledge that non-reviewable awards would not alleviate the major element of inaccuracy. Therein lies my preference for reviewable awards. They would treat facts as they exist and not as they may be imagined.

I refrain from repeating here the long litany of disadvantages inherent in our system under the tort regime of compensation payable by lump sum awards. I also refrain from an extensive repetition of the advantages of the system of periodic payments. They are all set forth in a balanced manner in the Manitoba Report and I commend the reading of that Report to anyone interested in the solution of this seemingly endless and intractable problem. Of this I am persuaded, that we accomplish little in the critical cause of law reform by applying our best talents and resources in shoring up a system which is fundamentally flawed and for which there is a conceptually acceptable alternative.

RECOMMENDATION

The Commission makes the following recommendation:

*1. The law in Ontario should not be changed to accommodate a system of periodic payments, whether reviewable or non-reviewable, that could be ordered by the court without the consent of the parties.

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* Dr. H. Allan Leal, O.C., Q.C., Vice Chairman of the Commission, dissents from this recommendation: see *supra*, this ch., sec. 5.

CHAPTER 6

COLLATERAL BENEFITS

1. INTRODUCTION

Following an injury, an injured person often receives assistance, or benefits, from a number of sources. One source may be the wrongdoer who has caused the injury and who is accordingly liable to pay to the injured person the full amount of the loss suffered. Other sources of benefits, commonly referred to as "collateral benefits", may include a variety of private sources, such as gifts from friends, family, and employers, or insurance benefits for which the injured person has contracted, as well as public income replacement sources, such as unemployment insurance, statutory disability pensions, or welfare. The difficult question raised by the broad availability of such collateral benefits is whether they should be taken into account when assessing the damages payable by the wrongdoer to the injured person.

Three alternative approaches may be taken to this issue. An injured person may be allowed to recover the full amount of damages from the wrongdoer as if no collateral benefit had been received; however, this approach may give rise to double recovery, that is, the possibility that the injured person will recover twice in respect of the same loss. Alternatively, the value of the collateral benefit may be deducted from the award of damages, so that the wrongdoer will be liable only for the net loss of the injured person; under this approach, the wrongdoer becomes, in effect, the beneficiary of the benevolence of the donor, or of the foresight of the injured person in insuring against the loss. The third alternative would deny the wrongdoer the advantage of the deduction of the collateral benefit from the damage assessment, but would require the injured person to repay the value of the collateral benefit to its source.

2. THE PRESENT LAW

(a) The No-Deduction Rule

In Ontario, no collateral benefits of any kind are deducted from an award of damages payable by a wrongdoer to an injured person. In 1973, in *Boarelli v. Flannigan*,[1] the Ontario Court of Appeal held that no deduction

[1] [1973] 3 O.R. 69, 36 D.L.R. (3d) 4 (subsequent references are to [1973] 3 O.R.)

should be made for welfare payments received by an injured person. Furthermore, in *dicta*, the Court clearly indicated that a wrongdoer should not obtain the advantage of the deduction of any other collateral benefits, whether from private or public sources.

In the course of his judgment, Dubin J.A. reviewed the leading English and Canadian authorities governing collateral benefits. In 1874, in *Bradburn v. Great Western Railway Co.*,[2] it was held that no deduction should be made for any benefit received from first party insurance that provides for payment of a fixed sum in the event of an accident. Such insurance was characterized as being in the nature of a wager, since "one who pays premiums for the purpose of insuring himself, pays on the footing that his right to be compensated when the event insured against happens is an equivalent for the premiums he has paid; it is a *quid pro quo*, larger if he gets it, on the chance that he will never get it at all".[3] The Court in *Boarelli* approved the following rationale, articulated in *Shearman v. Folland*,[4] for not allowing deduction of private insurance benefits:[5]

> If the wrongdoer were entitled to set off what the plaintiff was entitled to recoup or had recouped under his policy, he would in effect be depriving the plaintiff of all benefit from the premiums paid by the latter, and appropriating that benefit to himself.

With respect to gratuitous payments, Dubin J.A. observed in *Boarelli*[6] that money received by an injured person as a result of either public or private benevolence has never been taken into consideration in assessing damages for loss of income or earning capacity, and quoted Lord Reid in *Parry v. Cleaver*,[7] to the following effect:[8]

> It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large, and that the only gainer would be the wrongdoer.

In holding that welfare payments are not deductible from an award of damages payable by the wrongdoer, the Court in *Boarelli* stated that there is

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[2] (1874), L.R. 10 Ex. 1, 44 L.J. Ex. 9 (subsequent references are to L.R. 10 Ex.).

[3] *Ibid.*, at 4.

[4] [1950] 2 K.B. 43, at 46, [1950] 1 All E.R. 976 (C.A.).

[5] *Supra*, note 1, at 76.

[6] *Ibid.*, at 73.

[7] [1970] A.C. 1, at 14, [1969] 2 W.L.R. 821 (H.L.) (subsequent references are to [1970] A.C.).

[8] *Supra*, note 1, at 73.

no difference in principle between benefits received under social welfare legislation and those received by way of public or private benevolence.[9]

Dubin J.A. also dealt, in *dicta*, with the deductibility of benefits derived from employment. He referred to the leading English case, *Parry v. Cleaver*,[10] in which the House of Lords had held that benefits received under a statutory pension plan were not to be considered in assessing damages. In that case, after emphasizing that benefits from private insurance plans are not deductible, Lord Reid stated:[11]

> Then I ask—why should it make any difference that [the injured person] insured by arrangement with his employer rather than with an insurance company? In the course of the argument the distinction came down to be as narrow as this: if the employer says nothing or merely advises the man to insure and he does so, then the insurance money will not be deductible; but if the employer makes it a term of the contract of employment that he shall insure himself and he does so, then the insurance money will be deductible. There must be something wrong with an argument which drives us to so unreasonable a conclusion.

In *Boarelli*, Dubin J.A. expressly adopted, in respect of collateral benefits received by virtue of employment, the following approach taken by Lord Pearce in *Parry v. Cleaver*:[12]

> If one starts on the basis that *Bradburn's* case ... decided on fairness and justice and public policy, is correct in principle, one must see whether there is some reason to except from it pensions which are derived from a man's contract with his employer. These, whether contributory or non-contributory, flow from the work which a man has done. They are part of what the employer is prepared to pay for his services. The fact that they flow from past work equates them to rights which flow from an insurance privately effected by him. He has simply paid for them by weekly work instead of weekly premiums.
>
> Is there anything else in the nature of these pension rights derived from work which puts them into a different class from pension rights derived from private insurance? Their 'character' is the same, that is to say, they are intended by payer and payee to benefit the workman and not to be a subvention for wrongdoers who will cause him damage.

The Court in *Boarelli*, therefore, extended the rationale for no-deduction, articulated in *Parry v. Cleaver* in respect of pensions, to all benefits derived from employment, including sick pay,[13] disability pensions, and

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[9] *Ibid.*, at 74.

[10] *Supra*, note 7.

[11] *Ibid.*, at 14-15.

[12] *Ibid.*, at 37.

[13] In the earlier English case of *Browning v. War Office*, [1963] 1 Q.B. 750, [1962] 3 All E.R. 1089, the Court of Appeal held that sick pay benefits should be deducted from a damage

early retirement benefits. Dubin J.A. also approved an earlier decision of the New Brunswick Court of Appeal, which had refused to allow deduction of statutory unemployment benefits on the basis that "the wrongdoer is not entitled to the benefit of a policy of insurance for which he has paid nothing".[14]

In *Canadian Pacific Ltd. v. Gill*,[15] the Supreme Court of Canada approved and adopted the reasoning of *Parry v. Cleaver* when it refused to deduct from an award of damages Canada Pension Plan benefits, which were characterized as insurance "contracted" for as part of the injured person's employment. More recently, the Supreme Court reaffirmed this position by refusing to deduct private employment pension benefits.[16]

As a result of the foregoing decisions, any benefit that can be characterized as being in the nature of insurance, or as having been derived from a contract of employment, will not be deducted from an award of damages payable by a wrongdoer. Furthermore, it appears that benefits that can be considered to be benevolent payments, whether from a private or public source, likewise will not be deducted.

(b) Mechanisms for Avoiding Double Recovery

The broad application of the no-deduction rule does not mean that an injured person who has received a collateral benefit invariably will be overcompensated by double recovery for the loss. A number of mechanisms exist to ensure that the third party source of the collateral benefit is reimbursed.

(i) Subrogation

The first means of avoiding double recovery is through the exercise of the right of subrogation. Subrogation is an equitable right of an insurer, who has paid for a loss, to receive the benefit of all the rights and remedies of the insured against third parties that, if satisfied, will extinguish or diminish the ultimate loss sustained.[17] An insurer who has paid for a loss is generally

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award in order to avoid overcompensation. That case dealt specifically with a disability pension and, to that extent, has been overruled by *Parry v. Cleaver*, *supra*, note 7. However, it appears that *Browning* may still apply in England in cases where the salary of the injured person is simply continued under the terms of his contract as though he continued to work.

[14] *Bourgeois v. Tzrop* (1957), 9 D.L.R. (2d) 214, at 224-25.

[15] [1973] S.C.R. 654, 37 D.L.R. (3d) 229.

[16] *Guy v. Trizec Equities Ltd.*, [1979] 2 S.C.R. 756, 99 D.L.R. (3d) 243.

[17] See Parkington, O'Dowd, Leigh-Jones, and Longmore (eds.), *MacGillivray & Parkington on Insurance Law* (6th ed., 1975), at 776. The doctrine was described in *Gibson v. Sun Life Assurance Co. of Canada* (1984), 45 O.R. (2d) 326, 6 D.L.R. (4th) 746 (H.C.J.)

entitled to reimbursement from an insured who has recovered damages for that loss from a wrongdoer.[18]

In *Glynn v. Scottish Union & National Insurance Co. Ltd.*,[19] the Ontario Court of Appeal dealt with subrogation in relation to an insurance policy that provided for payment of medical benefits in the event of an accident. The Court held that the right of subrogation arises, unless expressly excluded, in every contract of indemnity insurance. And every contract of insurance is to be construed as a contract of indemnity, unless the terms of the agreement make it clear that the intention of the parties was not to enter into a contract of indemnity.[20]

The Court of Appeal in *Glynn* recognized that certain kinds of insurance, such as life insurance and some accident insurance, are not indemnity insurance, in that they provide for payment of a specific sum on the happening of a contingency, irrespective of whether pecuniary loss is sustained.[21] Subrogation does not arise from such non-indemnity insurance contracts unless expressly provided. Where, however, proof of loss, as well as the happening of the event, must be shown in order to recover under the policy, the contract is an indemnity contract, carrying with it the right of subrogation, unless subrogation is expressly excluded.[22] Moreover, a requirement of proof of loss will be implied in every contract of insurance, unless the terms of the agreement expressly indicate the contrary.[23]

The decision in *Glynn* makes it clear that the designation or title of an insurance policy is not determinative; rather, the terms of the contract, express or implied, must be considered in order to determine whether or not

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(subsequent references are to 45 O.R. (2d)), adopting (at 333) the following statement from *National Fire Ins. Co. v. McLaren* (1886), 12 O.R. 682 (Ch. Div.), at 687:

> The doctrine of subrogation is a creature of equity not founded on contract, but arising out of the relations of the parties. In cases of insurance where a third party is liable to make good the loss, the right of subrogation depends upon and is regulated by the broad underlying principle of securing full indemnity to the insured, on the one hand, and on the other of holding him accountable as trustee for any advantage he may obtain over and above compensation for his loss. Being an equitable right, it partakes of all the ordinary incidents of such rights, one of which is that in administering relief the Court will regard not so much the form as the substance of the transaction. The primary consideration is to see that the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the insurance company.

[18] See Parkington, O'Dowd, Leigh-Jones, and Longmore, *supra*, note 17.

[19] [1963] 2 O.R. 705, 40 D.L.R. (2d) 929 (subsequent references are to [1963] 2 O.R.).

[20] *Ibid.*, at 711.

[21] *Ibid.*, at 709-10.

[22] *Ibid.*, at 713.

[23] *Ibid.*, at 711.

it is indemnity insurance. It is arguable that many collateral benefits of a "quasi-insurance" nature—such as unemployment benefits, pensions and disability benefits—that have been characterized by the courts as "insurance"[24] and are intended to indemnify the injured person for a specific pecuniary loss, give rise to a right of subrogation exercisable by the source of that benefit, regardless of whether a right of subrogation has been expressly provided by contract or statute.[25]

The right of subrogation does not arise until the injured person has been fully indemnified for his total loss.[26] Accordingly, where, for example, a total loss of $2,000 is suffered, of which $1,000 represents lost wages for which the injured person has been indemnified by a collateral source, and the wrongdoer is able to pay only $1,500 of the total loss, the right of subrogation of the collateral source will not arise until the injured person has received at least $1,000 from the wrongdoer.

There currently exists some doubt, however, concerning whether there is a right of subrogation where an injured person recovers a partial indemnity from a collateral source and a partial indemnity from the wrongdoer that, in total, exceed the amount of the loss.[27] Nevertheless, a persuasive argument may be made that, on general principles of subrogation, an insurer should be entitled to be subrogated after the injured person has received a full indemnity, regardless of the source.

Many statutory compensation schemes expressly provide for subrogation with respect to benefits paid.[28] Other statutory schemes provide that

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[24] *Ibid.*, at 715.

[25] See Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at 478-79, and 487.

[26] *Ledingham v. Ontario Health Services Commission*, [1975] 1 S.C.R. 332, 46 D.L.R. (3d) 699.

[27] See *Gibson v. Sun Life Assurance Co. of Canada*, *supra*, note 17, at 338, where the Court stated as follows:

> The principle derived from these decisions is that the insured is required to account to the subrogated insurer for money received from third parties on account of the loss to the extent that the money received exceeds the amount required for full indemnity; but the insurer cannot assert a claim to recover money it has paid to the insured, or withhold future payments under the policy, until such time as the insured has received full indemnity *from the tortfeasor*. (Emphasis added)

[28] See, for example, *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, s. 51, as am. by S.C. 1974-75-76, c. 80, s. 19; *Compensation for Victims of Crime Act*, R.S.O. 1980, c. 82, s. 26, as am. by S.O. 1986, c. 37, s. 5; *Insurance Act*, R.S.O. 1980, c. 218, ss. 129, 231(5), and 242; and *Health Insurance Act*, R.S.O. 1980, c. 197, ss. 36-43. In the area of motor vehicle accidents, the Ontario Health Insurance Plan has agreed to accept an annual payment from the major insurance companies in lieu of subrogation rights. We are advised that the current annual payment is approximately $40-45 million.

benefits may be conditional upon the recipient giving a prior undertaking to reimburse the source in the event of recovery from the wrongdoer.[29]

(ii) Direction by the Court to Repay

A second method of avoiding double recovery and overcompensation involves a direction by the court that a portion of damages attributable to a specific loss be held in trust and repaid to the third party source of the collateral benefit. A number of Canadian cases[30] have followed this approach, first taken by Lord Denning in the English case of *Dennis v. London Passenger Transport Board*.[31] In that case, an award of damages was made for a loss that had been covered by a collateral benefit, subject to a direction that the injured person pay over the moneys to the third party source of the benefit.

However, it is unclear how broadly this approach would be applied by a court. Such a direction to pay appears to have been limited to circumstances where the injured person was under a moral, but not a legal, obligation to repay the benefit, and may be dependent on some prior voluntary undertaking to repay the donor.[32] There is some indication that, in the absence of such a prior agreement, a court nevertheless would award the amount of the loss, and leave the injured party and her benefactor to resolve the matter of reimbursement between themselves.[33]

Nevertheless, it has been suggested that the imposition of a direction to repay a collateral benefit may be considered an aspect of the indemnity doctrine of insurance law, whereby "subrogated rights are protected by the imposition of a trust".[34] Alternatively, it may be argued that the practice is defensible on the basis that a constructive trust arises in favour of the donor when the injured person recovers for the same loss from the wrongdoer.[35] Either analysis might persuade a court to allow a broader application of this mechanism of repayment of collateral benefits.

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[29] See, for example, R.R.O. 1980, Reg. 318, s. 10(1), made pursuant to the *Family Benefits Act*, R.S.O. 1980, c. 151; and R.R.O. 1980, Reg. 441, s. 4(1), made pursuant to the *General Welfare Assistance Act*, R.S.O. 1980, c. 188.

[30] *Myers v. Hoffman*, [1955] O.R. 965, 1 D.L.R. (2d) 272 (H.C.J.); *Rawson v. Kasman*, [1956] O.W.N. 359, 3 D.L.R. (2d) 376 (C.A.), varying [1955] O.W.N. 895 (H.C.J.); and *Coderre v. Ethier* (1978), 19 O.R. (2d) 503, 85 D.L.R. (3d) 621 (H.C.J.).

[31] [1948] 1 All E.R. 779 (K.B.).

[32] See Cooper-Stephenson and Saunders, *supra*, note 25, at 487-88.

[33] *Boarelli v. Flannigan*, *supra*, note 1, at 80. See, also, *Donnelly v. Joyce*, [1974] Q.B. 454, at 463-64, [1973] 3 All E.R. 475 (C.A.).

[34] Cooper-Stephenson and Saunders, *supra*, note 25, at 488.

[35] *Ibid.*, *n.* 64.

(iii) Independent Cause of Action by the Source of Collateral Benefit

Another method of avoiding double recovery for the same loss is to give the source of the collateral benefit a separate right of action against the wrongdoer to recover the amount paid to the injured person. As we have discussed,[36] an employer may have a common law cause of action, the *actio per quod servitium amisit*, to recover lost wages and medical expenses paid to an injured employee. Similarly, as discussed above,[37] a claim may be made by a third party against the wrongdoer pursuant to section 61 of the *Family Law Act, 1986*,[38] for such items as out-of-pocket expenses reasonably incurred, or the value of nursing, housekeeping, and other services provided.

Since many of the losses claimable by third parties in a separate action also may be claimed by the injured person, a possibility exists that the wrongdoer may be required to pay twice for the same loss. However, it appears that the courts have taken care to deny double recovery for the same loss by both the third party and the injured person in separate actions.[39]

3. THE CASE FOR REFORM

(a) Arguments For and Against the No-Deduction Rule

The current law in Ontario, which does not permit the deduction of collateral benefits from a damage award, has been severely criticized, on both theoretical and practical grounds, for overcompensating victims of tort injuries. Double recovery, it is said, is both wasteful and unjustifiable, and brings the tort system into disrepute.

The no-deduction rule is most commonly defended on the ground that it is better that an injured person should be overcompensated than that a wrongdoer should benefit by reason of benevolence intended for the injured person, or by the providence of the injured person in purchasing insurance benefits. A related argument focuses on the injustice of depriving the injured person of benefits for which she has paid.

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[36] *Supra*, ch. 2, sec. 9.

[37] *Supra*, ch. 2, sec. 2(c)(ii) and ch. 4, sec. 5.

[38] S.O. 1986, c. 4.

[39] See *Nugent v. Board of Rosetown School Unit No. 43*, [1977] 5 W.W.R. 224, 2 C.C.L.T. 325 (Sask. C.A.); *Greenwood v. Sparkle Janitor Service* (1983), 43 B.C.L.R. 333, 145 D.L.R. (3d) 711 (S.C.); and *Chan v. Butcher* (1984), 51 B.C.L.R. 337, 11 D.L.R. (4th) 233 (C.A.). The exception is the possible double recovery of medical expenses by members of the Canadian Armed Services: see *Attorney-General of Canada v. Szaniszlo* (1985), 69 B.C.L.R. 96, 25 D.L.R. (4th) 606 (S.C.).

Economic arguments are also advanced for imposing full liability on the wrongdoer. While there is some disagreement whether, in light of the widespread use of liability insurance, individual deterrence is achieved by the no-deduction rule, it is argued that an activity will be more or less popular according to its cost, and that the attribution to dangerous activities of their full cost may affect the extent to which they are pursued.

It is further argued in support of the existing rule that, from a practical point of view, overcompensation is more apparent than real: due to theoretical and practical shortcomings of the tort regime, it is said, even successful plaintiffs are not fully compensated for their losses, and the no-deduction rule helps to provide some "rough justice".

As we have indicated, the main argument advanced against the rule precluding the deduction of collateral benefits is that it leads to double recovery and overcompensation. Critics point out that it is a fundamental principle of tort law that an injured person should be compensated for the full amount of his loss, but no more; an injured person should not be entitled to turn an injury into a "windfall". As a practical matter, double recovery is said to be wasteful of scarce resources,[40] a fact that is regarded as particularly objectionable when it is generally accepted that many accident victims are undercompensated, or not compensated at all. The problem of overcompensation is compounded by the fact that prejudgment interest must be paid on the entire judgment, including that portion of the loss for which the injured person has recovered twice.

In response to the arguments in favour of the no-deduction rule, critics of the rule say that to focus on the alleged "benefit" to the wrongdoer is to misconstrue the essential goal of the tort system, that is, corrective justice: tort principles are intended to restore the injured person to the position she enjoyed prior to the injury, not to punish the wrongdoer whose "fault" may have consisted merely of a momentary inadvertence.

The companion argument that the victim should not be deprived of benefits for which he has paid may also be criticized, at least so far as indemnity payments are concerned. In such cases, what the victim has paid for, loosely speaking, is insurance against specific losses. The insured obtains the security of coverage should the loss occur, and indemnity for the loss when it does occur. Where a tort victim receives indemnity from an alternative source, it may be argued that he obtains exactly what was paid for, unless the position is taken that what the victim paid for is the very prospect of double recovery.

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[40] It is alleged that overcompensation encourages injured persons to remain absent from work longer than they otherwise might, which increases the perception of the seriousness of their injuries, thereby magnifying damage awards: Insurance Bureau of Canada, *Submission to the Ontario Law Reform Commission, Project on Compensation for Personal Injuries and Death* (June, 1986), at 10.

A further argument that favours deduction of collateral benefits from an award of damages has been made from the perspective of loss distribution and reallocation. This argument calls for a recognition that tort damages and collateral benefits, for the most part, are not paid by individuals or isolated sources; rather, both sources of payment to the injured person are, in fact, "risk pools" or "risk communities",[41] comprising large sections of the public, which absorb the cost through insurance, or through the loss spreading processes of large-scale organizations.

"Risk pools" are either third party or first party in nature. Third party "risk pools" are made up of all persons who participate in a risk-creating activity, such as driving a car, and who insure against damage they may cause to others through such activity. First party "risk pools" are composed of persons who have contributed to a scheme of insurance against losses to themselves; such risk pools may vary in size, from a limited number of persons, such as those who purchase private accident insurance, to a large portion of society, such as those who contribute to the unemployment insurance scheme, and may even include the entire taxpaying public, as in the case of publicly funded health care or welfare.[42] There is often a significant overlap between those persons who comprise the first party and third party risk pools from which an injured person may receive double recovery; for example, large numbers of the driving public who buy third party automobile insurance also contribute to the unemployment insurance scheme.[43] It has been argued that contributors to both such pools may justifiably object to the injured person obtaining recovery from both sources. Furthermore, it is not regarded as "axiomatic" that the third party risk pool should bear the burden of the loss in every case.[44] It has been argued that, particularly in the case of publicly provided benefits, such as health care or welfare, the first party risk pool should absorb the loss, by allowing the collateral benefit to be deducted.

A number of reasons for this position have been advanced.[45] First, it is argued that the donor of such collateral benefits ordinarily will be in as good a position to spread the risk as the wrongdoer, and often will be in a better position. It is emphasized that statutory benefit schemes, in particular, are designed to spread such losses among the greatest number of contributors,

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[41] Cooper-Stephenson and Saunders, *supra*, note 25, at 479. See, also, Conard, "The Economic Treatment of Automobile Injuries" (1964-65), 63 Mich. L. Rev. 279, at 311-12.

[42] Cooper-Stephenson and Saunders, *supra*, note 25, at 480.

[43] Conard, *supra*, note 41.

[44] Cooper-Stephenson and Saunders, *supra*, note 25, at 480. See, also, Friedmann, *Law in a Changing Society* (2d ed., 1972), at 183-84.

[45] These arguments are fully canvassed in Cooper-Stephenson, "A Collateral Benefits Principle" (1971), 49 Can. B. Rev. 501, at 521-33, and are summarized in Cooper-Stephenson and Saunders, *supra*, note 25, at 481-82.

often the taxpaying public at large. Secondly, it is argued that deduction of such benefits would avoid the costly and timeconsuming process of retransferring or readjusting the loss by the exercise of a recovery mechanism, such as subrogation, or a third party action by the donor of the benefit. Finally, it is said that a readjustment of the loss will be of little consequence to those who eventually pay; since most people contribute in one way or another to both the first and third party risk pools, any reshifting of the loss will be largely irrelevant.

These arguments appear to have persuaded the Pearson Commission in England, which recommended that all social security benefits should be deducted from damage awards.[46]

(b) Deficiencies in Mechanisms for Avoiding Double Recovery

In light of the various mechanisms for repayment of collateral benefits to their source, described above, it might be expected that incidences of double recovery would be rare, and not a matter of great concern. As we have discussed,[47] the right of subrogation is generally available wherever a payment in the nature of an indemnity for a specific pecuniary loss is made. Statutory subrogation rights are often provided with respect to publicly provided benefits.[48] Furthermore, third party donors who have made voluntary donations of a collateral benefit may seek a direction from the court for repayment,[49] or bring their own action against the wrongdoer to recover the value of services or donations made to the injured person.[50]

Nevertheless, for largely practical reasons, the current rule of no-deduction of collateral benefits continues to raise concerns about double recovery and overcompensation. Most significantly, we are advised that disability insurers and employers generally do not exercise their rights of subrogation. Most disability and accident insurers apparently regard the cost of establishing a system of subrogation to be unwarranted in light of the benefit that would be derived and, accordingly, prefer to absorb and spread the amounts paid to the insured through their own funding structure. Employers also regard the exercise of subrogation rights to be impractical and costly, particularly where recovery would be attempted months or years after providing the benefit. They often have no effective means of monitoring the progress of the injured person's claim, or of identifying what parts of

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[46] United Kingdom, Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (Cmnd. 7054, 1978), Vol. I, paras. 277-80, at 68.

[47] *Supra*, this ch., sec. 2(b)(i).

[48] *Ibid.*

[49] *Supra*, this ch., sec. 2(b)(ii).

[50] *Supra*, this ch., sec. 2(b)(iii).

a settlement represent lost wages. Furthermore, there is a reluctance on the part of employers to exercise such a right of recovery because of its possibly detrimental impact on employee relations.

Similarly, where the collateral benefit has been given voluntarily, whether by an employer, friend or relative, there is often a natural reluctance to seek recovery from the injured person, although it may have been entirely reasonable for the donor to expect such reimbursement when the injured person obtained full compensation from the wrongdoer. Moreover, as we have said,[51] it is not entirely clear whether a court would make a direction to repay the collateral benefit in the absence of a prior voluntary agreement on the part of the injured person to reimburse the donor.

4. CONCLUSIONS

The Commission is of the view that fundamental principles of tort law require that, so far as reasonably possible, an injured person should be fully compensated, but should not recover doubly for the same pecuniary loss. We also believe that the goal of deterrence, as well as a general sense of justice and fairness, require that a wrongdoer should be held liable to pay the full amount of the loss caused by his negligent conduct. Despite allegations that the collateral source rule gives rise to significant overcompensation, there appears to be little empirical evidence to indicate the magnitude of such overcompensation, or the effect that the rule has on insurance premiums.[52] Nevertheless, it is apparent to us in light of the abovementioned principles that, regardless of the actual extent of overcompensation, the optimal solution to the debate with respect to collateral benefits will lie in providing an efficient and inexpensive mechanism for repayment to its source of any amount that constitutes overcompensation for the same pecuniary loss.

Before proceeding to our reform proposals, one important point should be clarified. We believe that the current no-deduction rule can be criticized only insofar as it allows for double recovery with respect to the same pecuniary loss. In our view, a collateral benefit, whether in the nature of insurance or a benevolent payment, that is not clearly duplicative of an item

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[51] *Supra*, this ch., sec. 2(b)(ii).

[52] At the final stage of preparation of this Report, the Commission received some data from the preliminary results of a claims survey conducted for the Inquiry Into Motor Vehicle Accident Compensation in Ontario (the "Osborne Inquiry"). Although the survey suggests that some degree of overcompensation is taking place, the results are not yet final and we are reluctant to draw any firm conclusions from the available data. Nevertheless, we are persuaded that, across a range of possible empirical results, the solution that we have proposed—which provides a mechanism for avoiding double recovery and does not diminish the defendant's responsibility—is the appropriate response.

We are grateful to the Osborne Inquiry for the information and assistance we have received in respect of the claims survey.

of damage or loss claimed by the injured person from the wrongdoer, cannot be said to constitute double recovery. A non-indemnity accident benefit that pays a specified sum upon proof of the event of an accident, but without proof of loss, cannot be regarded as duplicating recovery for a loss. Similarly, a gift to an injured person from a relative of a sum of money, not designated to relieve a particular loss, would not be *in pari materia* with any specific pecuniary claim by the injured person and, accordingly, in our view, cannot be considered, in theory or in fact, double recovery.

It is where a collateral benefit is in the nature of an indemnity for a specific pecuniary loss that double recovery, and therefore overcompensation, can be said to arise. It should be re-emphasized that requiring an injured person to repay an amount obtained over and above the actual loss for which she has been indemnified does not detract from the "benefit" for which she contracted; rather, as we have discussed,[53] the nature of an indemnity arrangement contemplates full compensation, with any amount paid in excess being subject to subrogation. While subrogation is the most common mechanism available for avoiding duplication of recovery of a loss for which the injured person has been indemnified by a collateral source, we have seen that this right generally has not been exercised by insurers or employers for a number of reasons, including the cost, inconvenience, and negative implications for employee relations of implementing an effective scheme of subrogation.

As we have indicated, where the collateral source has made *ex gratia* payments, or gifts, to the injured person in order to allay specific losses or needs, such as wages or medical expenses, uncertainty may arise with respect to entitlement to repayment of such benefits. In our view, despite their voluntary nature, it is not unreasonable to assume that such a collateral source expects to be reimbursed eventually for such amounts, if the injured person is fully compensated by the wrongdoer.

We have concluded that the process of subrogation, or reimbursement of the collateral source, will be facilitated, and the principle that the wrongdoer should pay the full amount of the loss will be maintained, by the following proposal. Where an injured person has received an indemnity, or an *ex gratia* payment, in respect of any specific pecuniary loss claimed from a wrongdoer, the damages in respect of that loss should be held in trust for the collateral source.[54] Moreover, the wrongdoer or his insurer should be entitled to make payment of such damages directly to the collateral source and should be entitled to receive a discharge of liability to the injured person, to the extent of such payment. Payment of such amount of damages should also include prejudgment interest on the amount.[55]

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[53] *Supra*, this ch., sec. 2(b)(i).

[54] See the draft *Personal Injuries Compensation Act* proposed by the Commission (hereinafter referred to as "draft Compensation Act"), *infra*, Appendix 1, s. 14(1)(b).

[55] *Ibid.*, s. 14(1)(a).

As we have discussed, the right of subrogation currently does not arise until the injured person has been indemnified for his total loss.[56] We believe that the present law in this respect should not be altered. However, there is some uncertainty regarding the right of subrogation where there has been partial indemnity from a wrongdoer and partial indemnity from a collateral source that, cumulatively, exceed the full loss.[57] In our view, a collateral source should be entitled to be repaid after the injured person has received full indemnity, from any source. Accordingly, we have concluded that the recommendations proposed above should not apply until the injured person has been fully indemnified for her entire loss from any source or combination of sources, and we so recommend.[58]

It may be argued that *ex gratia* payments from friends or employers, being in the nature of outright gifts, should not be subject to this proposal. However, we are of the view that, if the donor of such collateral benefits does not expect, or want, repayment, he would remain free, upon reimbursement, to remake the gift to the injured person.

The Commission has also considered whether collateral benefits received from a public source, such as welfare or health care services, should be excepted from the general recommendation, and should be taken into account to reduce the liability of a wrongdoer for damages in respect of losses indemnified by the public source. The argument in favour of such a proposal is a practical one: it would eliminate the costs involved in recovery. Such costs are regarded as unwarranted, since recovery, in effect, merely transfers the loss from one source to another. It is argued that, since those persons who fund third party insurance sources are largely the taxpaying public, who also fund the public source, such a retransfer of the loss is wasteful and ultimately of benefit to no one.

While the argument for deduction of publicly provided benefits has some attraction, we hesitate to embrace it at this time, for a number of reasons. For one thing, the proposal is, at least in theory, inconsistent with the deterrence objectives of tort law. For another, the desirability of transferring to the entire taxpaying public the cost of an activity carried on by only a portion of the public may be questioned. The force of this objection depends, of course, on the extent of congruence between the two groups, which will vary from benefit to benefit, and from accident to accident.

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[56] *Supra*, this ch., sec. 2(b)(i).

[57] *Ibid.*

[58] Draft Compensation Act, s. 14(2). The Commission recognizes that its recommendation permitting payment by the wrongdoer directly to the collateral source may affect settlement behaviour on the part of the wrongdoer, or her insurer, and the injured person. The latter might, for example, be persuaded to accept less than full indemnity with respect to a specific loss for which she has already received a collateral benefit in return for an agreement by the wrongdoer not to make the payment to the collateral source. Nevertheless, we consider that the advantages of our proposal outweigh any negative implications for the settlement process.

Finally, we do not have sufficient information to assess the cost savings to be achieved by permitting deduction of collateral benefits received from public sources. The Commission has no evidence to indicate the costs incurred as a result of transferring losses from one source, or "risk pool", to another, although it would appear that the Ontario Health Insurance Plan regarded the potential overall savings in administrative or "retransfer" costs significant enough to enter into an agreement with motor vehicle insurers to receive a direct payment based on a percentage of premiums in exchange for forgoing its statutory subrogation rights. Nor do we have information concerning amounts actually recovered by various public sources through the exercise of subrogation rights or pursuant to undertakings to repay, except, once again, in the area of motor vehicle accidents, where we know that the yearly payment to the Ontario Health Insurance Plan by the insurance industry is substantial.[59]

On balance, therefore, we have concluded that, without further study, no change should be made to the current law prohibiting the deduction of publicly funded benefits from damage awards. To the degree that such benefits constitute indemnities for specific pecuniary losses, they should be subject to the foregoing recommendations. At the same time, we would welcome detailed empirical analysis of public benefit programs to determine whether, for any class of accidents, (for example, automobile, medical malpractice) the potential administrative cost savings to be obtained from abrogating the collateral benefits rule would outweigh the loss of deterrence inherent in establishing liability at less than the full social loss.

It will be a question of fact in each case whether the collateral benefit is *in pari materia* with the damage claimed, and, accordingly, subject to the Commission's proposals. Certain kinds of benefit will be readily identifiable as indemnity benefits; obvious examples would be private or public wage replacement benefits, including unemployment insurance and sick leave income supplements, or payments of medical expenses, such as private extended medical coverage. Other kinds of benefit would clearly not be indemnity payments; for example, retirement pension benefits contributed to and earned as a part of employment, or disability benefits in the nature of non-indemnity accident or life insurance,[60] should not be encompassed by our proposals.

Finally, we would note that our recommendations are not intended to apply to collateral benefits that might be paid in the future. If the future collateral benefits are to be paid pursuant to a non-indemnity insurance contract, they are not encompassed by our recommendations. If such benefits are indemnity payments in respect of a specific loss, and the injured person has recovered for that same loss from the wrongdoer, the indemnity

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[59] This payment is currently approximately $40-45 million: see *supra*, note 28.

[60] Canada Pension Plan death benefits were characterized as equivalent to life insurance benefits in *Canadian Pacific Ltd. v. Gill*, *supra*, note 15.

insurer is under no obligation to make any further payments in respect of that loss.[61] Double recovery with respect to future payments may be avoided simply by giving notice to the indemnity insurer that the loss has been fully paid. If the indemnity insurer nevertheless decides to continue making payments, such payments would be equivalent to a gift.

The same holds true for a benevolent or *ex gratia* source of a collateral benefit. Our recommendations with respect to *ex gratia* payments assume that the donor would not have made the payments, or would have expected to recover the payments, if damages in respect of the loss had been paid by the wrongdoer. If notice of full payment of a specific loss is given to the benefactor, and she nevertheless continues to make payments, it may be assumed that such payments are intended as gifts.

Recommendations

The Commission makes the following recommendations:

1. Where an injured person has received an indemnity, including an *ex gratia* payment, in respect of any specific pecuniary loss claimed from a wrongdoer, the damages in respect of that loss should be held in trust for the collateral source.

2. (1) The wrongdoer, or her insurer, should be entitled to make payment of such damages directly to the collateral source, and should be entitled to receive a discharge of liability to the extent of such payment.

   (2) Payment of damages to the collateral source should include pre-judgment interest.

3. Recommendations 1 and 2 should not apply until the injured person has been fully indemnified for her entire loss from any source or combination of sources.

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[61] Parkington, O'Dowd, Leigh-Jones, and Longmore, *supra*, note 17, at 780.

CHAPTER 7

PREJUDGMENT INTEREST

1. INTRODUCTION

Considerable time can elapse between an accident and the final resolution of a resulting personal injury claim. In the absence of prejudgment interest, this creates a natural advantage for the defendant, who has the use of the money pending disposition of the claim. The lapse of time can create difficulties for a plaintiff, who will usually suffer a loss of income, but who must nevertheless cover normal living costs as well as accident-related expenses. To meet such expenses, most injured persons must either draw on savings or borrow money, thereby incurring an additional loss, that is, the loss of interest on savings or the cost of interest on money borrowed.

Most persons agree that some form of interest should be paid on losses incurred prior to judgment. There is disagreement, however, concerning the date from which interest should begin to accumulate and the rate of interest that should be paid. These issues form the subject matter of this chapter.

2. THE PRESENT LAW

At common law, a defendant was not required to pay interest on damages that had accrued to the time of trial.[1] This rule has been explained as reflecting the view that no debt was owed by the defendant until the court had decided in favour of the plaintiff.[2] It has also been attributed to the longstanding prejudice in Christian countries against usury.[3]

In Ontario, legislation was introduced in 1977 to provide for payment of prejudgment interest.[4] Section 138 of the *Courts of Justice Act, 1984*,[5] which governs prejudgment interest, provides, in part, as follows:

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[1] See Waddams, *The Law of Damages* (1983), para. 870, at 495-96.

[2] Bruce, *Assessment of Personal Injury Damages* (1985), at 209.

[3] McGregor, *McGregor on Damages* (14th ed., 1980), para. 447, at 328.

[4] *The Judicature Amendment Act, 1977 (No. 2)*, S.O. 1977, c. 51, s. 3.

[5] S.O. 1984, c. 11.

138.—(1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated,

....

(b) where the order is made on an unliquidated claim, from the date the person entitled gave notice in writing of his claim to the person liable therefor to the date of the order.

(2) Where the order includes an amount for special damages, the interest calculated under subsection (1) shall be calculated on the balance of special damages incurred as totalled at the end of each six-month period following the notice in writing referred to in clause (1)(b) and at the date of the order.

(3) Interest shall not be awarded under subsection (1):

(a) on exemplary or punitive damages;

(b) on interest accruing under this section;

(c) on an award of costs in the proceeding;

(d) on that part of the order that represents pecuniary loss arising after the date of the order and that is identified by a finding of the court;

(e) where the order is made on consent, except by consent of the debtor; or

(f) where interest is payable by a right other than under this section.

An action for damages for personal injury is a claim for unliquidated damages. Under section 138(1)(b), therefore, the date from which prejudgment interest begins to run is the date that written notice of the claim is given.

The whole of the pre-trial loss generally does not arise at one time; rather, it cumulates from the date of the injury until judgment. For example, where an injured person is not compensated for two years, he may have a total income loss of $30,000 prior to trial. However, the injured person would have received only a portion of that total amount on a weekly or monthly basis, and, accordingly, can only be considered to have suffered the loss of its use from the time each portion of the amount would have become due. In response to this problem, section 138(2) provides that interest is to be calculated on the balance of "special damages" incurred, as totalled at the end of each six-month period following written notice of the claim, and at the date of judgment.

The term "special damages" is not defined by the Act. Furthermore, the term has no settled meaning in the law of damages. In personal injury cases, "special damages" generally refers to actual pecuniary losses incurred between the dates of the injury and the trial.[6] However, some uncertainty

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[6] *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452. See, also, *Jefford v. Gee*, [1970] 2 Q.B. 130, at 146, [1970] 1 All E.R. 1202 (C.A.) (subsequent references are to [1970] 1 All E.R.).

remains as to when damages will be considered "special", as opposed to "general", in nature.[7]

The rate of interest paid on pre-trial loss is established by section 137(1)(d) of the *Courts of Justice Act, 1984*, which defines the prejudgment interest rate as follows:

> 137.—(1) In this section and in sections 138 and 139,
>
> ....
>
> (d) 'prejudgment interest rate' means the bank rate[8] at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced, rounded to the next higher whole number where the bank rate includes a fraction, plus 1 per cent;

The rate used when prejudgment interest was first introduced was not the "bank rate", but, rather, the "prime rate",[9] which is the rate at which the chartered banks lend to their best, or "prime", customers.[10]

Section 140 of the Act confers on the court a discretion with respect to the award of prejudgment interest, "having regard to changes in market interest rates, the circumstances of the case, the conduct of the proceeding or any other relevant consideration". The court in its discretion may disallow interest, or may allow interest at a higher or lower rate, or for a period other than that provided by section 138. Such variation may be made in respect of the whole or any part of the amount on which interest is payable under section 138.

The current provision for prejudgment interest prohibits the award of compound interest. Section 138(3)(b) of the Act provides that "[i]nterest shall not be awarded under subsection (1)...on interest accruing under this section".

The same rate of prejudgment interest currently applies to both pre-trial pecuniary loss and non-pecuniary loss awarded at trial. In *Borland v. Muttersbach*,[11] the Ontario Court of Appeal upheld the lower court decision

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[7] See discussion in Waddams, *supra*, note 1, paras. 857-61, at 488-91.

[8] Section 137(1)(a) of the *Courts of Justice Act, 1984* defines "bank rate" as follows:

> (a) 'bank rate' means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short-term advances to the chartered banks;

[9] *The Judicature Amendment Act, 1977 (No. 2), supra*, note 4, s. 3.

[10] Apparently, the bank rate was adopted under the *Courts of Justice Act, 1984* as a result of difficulties that had been encountered using the prime rate, arising from the fact that the *Bank of Canada Review* is not published until some time after the rates are set. The bank rate, on the other hand, can be determined immediately: Watson and Perkins (eds.), *Holmested and Watson, Ontario Civil Procedure*, Vol. 1, at CJA-158.

[11] (1985), 53 O.R. (2d) 129, 23 D.L.R. (4th) 664 (subsequent references are to 53 O.R. (2d)).

in which Barr J. awarded the same rate of prejudgment interest for both pecuniary and non-pecuniary loss. The issue had been addressed in an earlier case, *Graham v. Persyko*,[12] in which the Court had apparently accepted the argument that the rate of interest reflects not only compensation for loss of the use of money, but also an allowance for the decline in the value of money, that is, an adjustment for inflation. Because non-pecuniary losses already are adjusted to reflect inflation to the date of trial,[13] Holland J., in *Graham*, reduced the rate of prejudgment interest on that portion of the damage award to 2.5 percent.[14]

In *Borland v. Muttersbach*, the trial judge rejected this argument explicitly.[15] The Ontario Court of Appeal upheld this decision on the ground that there was no evidence that the trial judge had erred.[16] The Court did not expressly consider the argument accepted by Holland J. in *Graham*.

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[12] (1984), 27 D.L.R. (4th) 701, 30 C.C.L.T. 85 (Ont. H.C.J.), cross-appeal related to the issue of prejudgment interest allowed (1986), 27 D.L.R. (4th) 699 (C.A.), at 717 (subsequent references are to 27 D.L.R. (4th)).

[13] In *Lindal v. Lindal*, [1981] 2 S.C.R. 629, at 643, 129 D.L.R. (3d) 263, the Supreme Court of Canada recognized that the $100,000 limit on non-pecuniary losses, established in *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, note 6, should be indexed for inflation occurring after January, 1978.

[14] *Graham v. Persyko*, *supra*, note 12, at 715.

[15] (1984), 49 O.R. (2d) 165, at 187-88, 15 D.L.R. (4th) 486 (H.C.J.). The Court's reasons were as follows:

> The award of $170,000 will purchase no more goods and services than $100,000 in 1978. The plaintiff receiving $170,000 in 1984 is receiving the same compensation as the plaintiff receiving $100,000 in 1978 although expressed in different dollars. Whatever the award, the statute gives the plaintiff the *prima facie* right to receive prejudgment interest on it at the prime rate prevailing in the month before it was issued. A defendant who is prepared to forgo investment income may reduce or extinguish the plaintiff's claim for prejudgment interest by making an advance payment or payments. An insurer who wishes to invest the money at current high rates should not profit by having the benefit of such rates while being required only to pay a nominal rate of interest to the plaintiff. In my view, this would discourage advance payments, thereby adding to the distress of the victims and would be contrary to the policy reflected by s. 36.
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> I am troubled too by the practical application of the *Graham* case. The context suggests that the trial judge there had in mind inflation occurring since the Trilogy. If inflation continues the upper limit, and presumably awards, will double in a matter of years if awards are adjusted for inflation. A case tried ten years hence will have an upper limit (assuming inflation at 7% per annum continuing) of $350,000, an increase of $250,000, an amount which will undoubtedly exceed the prejudgment interest accumulated after the statutory rate. To follow the *Graham* case would result in a refusal of prejudgment interest and, in effect, the abolition of prejudgment interest on non-pecuniary damages in such cases.
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> I conclude that the fact of inflation is not a proper ground to deprive the plaintiffs of their *prima facie* right to receive prejudgment interest at the prime rate.

[16] *Supra*, note 11, at 145-47.

3. THE LAW IN OTHER JURISDICTIONS

(a) ENGLAND

While the courts in England were given the discretion to award prejudgment interest on personal injury damages as early as 1934,[17] prejudgment interest was rarely granted until 1969, when legislation was amended to make such an award mandatory in respect of judgments over £200, in the absence of "special reasons why no interest should be given".[18] Under the English legislation, prejudgment interest accrues from the date when the cause of action arose, and the court has a discretion to award simple interest at such rate as it thinks fit, on the whole or any part of the damages, and for the whole or any part of that period. In *Jefford v. Gee*,[19] the Court of Appeal set out general guidelines with respect to the award of prejudgment interest, including the manner in which the discretion regarding the rate is to be exercised. The Court observed that the rate of prejudgment interest should reflect the earning capacity of the money during the time the plaintiff has been kept out of his money. The Court held that, in practice, a court should be guided by the rate payable on money in court that is placed on short-term investment account.[20]

The Court in *Jefford v. Gee* also dealt with the issue of special damages, which it defined as actual pre-trial pecuniary loss.[21] Unlike the position in Ontario, where special damages are cumulated at regular intervals until the date of trial, the Court held that special damages should earn interest at one-half the interest rate "determined to be appropriate", that is, one-half the rate paid on the short-term investment account established for payments into court.[22] The explanation for this rule is that this half-rate basis of calculation is "designed to provide a rough and ready but fair method of averaging out compensation for losses of earnings and out-of-pocket expenses which range over a period and comprise an aggregate of smaller, and often trifling, individual sums".[23]

In *Jefford v. Gee*, the Court of Appeal held that non-pecuniary losses should carry interest from the date of service of the writ to the date of trial.[24]

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[17] *Law Reform (Miscellaneous Provisions) Act, 1934*, c. 41 (U.K.), s. 3(1).

[18] *Administration of Justice Act 1969*, c. 58 (U.K.), s. 22. See, now, *Supreme Court Act 1981*, c. 54 (U.K.), s. 35A, as en. by *Administration of Justice Act 1982*, c. 53 (U.K.), s. 15.

[19] *Supra*, note 6, at 1206.

[20] *Ibid.*, at 1210 and 1212.

[21] *Ibid.*, at 1208.

[22] *Ibid.*, at 1212.

[23] England, The Law Commission, *Law of Contract: Report on Interest*, Law Com. No. 88 (1978), at 33.

[24] *Supra*, note 6, at 1209 and 1212.

This rule was subsequently altered by the Court of Appeal in *Cookson v. Knowles*,[25] where it was held that no interest should be awarded on non-pecuniary losses. The English Law Commission also took the view that no interest should be awarded on such losses. The rationale given by the Commission was that, since these losses are calculated in dollar values as of the date of trial rather than injury, the injured person has already "gained" by the increase in the award due to inflation, and ought not to have interest as well.[26]

The Royal Commission on Civil Liability and Compensation for Personal Injury (the "Pearson Commission") took a similar position with respect to damages for non-pecuniary loss, but for slightly different reasons:[27]

> [W]e agree...that no interest should be awarded on non-pecuniary damages. As we have pointed out elsewhere, in present economic conditions an investor may well be unable to do more than maintain the real value of his investment, once tax and inflation are taken into account, if indeed he can manage to do this. To award no interest on non-pecuniary damages may therefore be at least as favourable as the award of interest at a market rate on damages for past pecuniary loss. A more important justification, however, lies in the conventional nature of non-pecuniary damages. We do not think that it would be appropriate to subject essentially arbitrary figures to detailed financial calculations.

This position was subsequently rejected by the House of Lords in *Pickett v. British Rail Engineering Ltd.*,[28] where the Court held that interest should be awarded on damages for non-pecuniary loss, in order to "compensate for being kept out of that real value" of money. However, the Court did not say anything in that case about the appropriate rate that should be allowed.

In *Wright v. British Railways Board*,[29] the House of Lords accepted two percent as the real rate of interest after accounting for inflation. This rate was not fixed, however, but constituted a guideline that might be subject to revision in the event of fresh economic evidence.

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[25] [1977] 1 Q.B. 913, [1977] 3 W.L.R. 279.

[26] England, The Law Commission, *Report on Personal Injury Litigation—Assessment of Damages* Law Com. No. 56 (1973), at 74.

[27] United Kingdom, Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (Cmnd. 7054, 1978) (hereinafter referred to as the "Pearson Report"), Vol. 1, para. 747, at 162.

[28] [1980] A.C. 136, at 151, [1979] 1 All E.R. 774.

[29] [1983] 2 A.C. 733, at 784-85, [1983] 2 All E.R. 698. The 2% real rate was first adopted by the English Court of Appeal in *Birkett v. Hayes*, [1982] 1 W.L.R. 816, [1982] 2 All E.R. 710 (subsequent references are to [1982] 1 W.L.R.), where Lord Denning observed, at 821:

> [T]he plaintiff in 1981 received £30,000. I can see no possible justification for giving her interest on that inflated figure for the 4 2/3 years...she was not kept out of £30,000 for those 4 2/3 years. She was only kept out of £20,000.

(b) CANADA

(i) General

All Canadian common-law provinces, except Saskatchewan,[30] have passed legislation that provides for the award of prejudgment interest in personal injury actions.[31] With the exception of Ontario, those provinces that have provided for the award of prejudgment interest have specified that interest accrues from the date upon which the cause of action arose. As in England, all prejudgment interest provisions in Canada use mandatory language, providing that the Court *shall* award prejudgment interest. However, in each of those provinces that have provided for prejudgment interest in personal injury actions, except British Columbia, the court has a discretion, if the circumstances warrant, to refuse to award prejudgment interest, or to award such rate of interest as the court considers appropriate.[32]

As a number of reform issues relating to prejudgment interest have been considered recently by the British Columbia Law Reform Commission,[33] it will be useful to consider the law in that jurisdiction in more detail.

(ii) British Columbia

British Columbia was the first Canadian jurisdiction to provide for the award of prejudgment interest on personal injury awards.[34] As is the case in most other Canadian jurisdictions, prejudgment interest is calculated from the date on which the cause of action arose to the date of the order, and the award of prejudgment interest is mandatory. However, unlike the position elsewhere in Canada, the court in British Columbia has no discretion to

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[30] Section 46 of the Saskatchewan *Queen's Bench Act*, R.S.S. 1978, c. Q-1, provides as follows:

> 46. Interest is payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it.

In *Lamont v. Pederson* (1981), 7 Sask. R. 18, at 32, [1981] 2 W.W.R. 24, the Saskatchewan Court of Appeal disallowed a claim for prejudgment interest in a personal injury action, stating that "[s]ince damages have to be assessed and are not generally payable until they have been determined by a court, it has not been the practice of this jurisdiction to allow interest before judgment".

[31] *The Judgment Interest Act*, S.A. 1984, c. J-0.5, s. 2; *Court Order Interest Act*, R.S.B.C. 1979, c. 76, s. 1; *The Judgment Interest and Discount Act*, S.M. 1986, c. 39, s. 13(4)(1); *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 45; *The Judgment Interest Act*, S.N. 1983, c. 81, ss. 3-4; *Judicature Act*, S.N.S. 1972, c. 2, s. 38, as am. by S.N.S. 1980, c. 55, s. 1; and *Judicature Act*, R.S.P.E.I. 1974, c. J-3, s. 33, as am. by S.P.E.I. 1982, c. 13, s. 1.

[32] See statutory provisions cited *supra*, note 31.

[33] Law Reform Commission of British Columbia, *Report on the Court Order Interest Act*, L.R.C. 90 (1987) (hereinafter referred to as "B.C. Report").

[34] *Prejudgment Interest Act*, S.B.C. 1974, c. 65.

deny interest to a successful litigant. The rate of interest awarded is, on the other hand, discretionary in part: section 1(1) of the *Court Order Interest Act* provides that the rate should be such as "the court considers appropriate in the circumstances", although "the rate shall not be less than the rate that applies to interest on a judgment under the *Interest Act* (Canada)".[35] The current minimum rate is five percent.

As in Ontario, calculation of interest that accrues during the prejudgment period on "special damages" is made at six month intervals.[36] The term "special damages" is not defined. The British Columbia legislation also prohibits the award of compound interest.[37]

In its 1987 Report,[38] the British Columbia Law Reform Commission recommended that prejudgment interest should continue to be mandatory, and should be awarded based on a non-discretionary fixed rate established by statute.[39] Under this proposal, the only discretion available to the court would arise with respect to cases in which foreign interest rates are in issue.[40]

In determining the appropriate rate of prejudgment interest, the British Columbia Commission considered both the bank rate and the "prime" rate; the latter rate was defined as the rate charged on prime interest loans. The British Columbia Commission opted for the prime rate because, in its view, that rate responds quickly to changes in the marketplace and to inflation.[41] The Commission was further influenced in its choice by the fact that, in British Columbia, the rate payable on funds in court, and on default judgments, has been set by reference to the prime rate charged by that province's banker.[42]

The British Columbia Commission recommended that prejudgment interest should be compounded, because compounding "reflects more accurately the operation of the marketplace and more fully and accurately measures the cost of delay to the successful plaintiff".[43]

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[35] *Court Order Interest Act*, *supra*, note 31, s. 1(1).

[36] *Ibid.*, s. 1(2).

[37] *Ibid.*, s. 2(c).

[38] *Supra*, note 33.

[39] *Ibid.*, at 26.

[40] *Ibid.*

[41] *Ibid.*, at 30-31.

[42] *Ibid.*

[43] *Ibid.*, at 31. The Commission was satisfied that any difficulties in calculation would be addressed by the operation of the "multiplier" mechanism that had been proposed in its Report for the calculation of prejudgment interest.

The Commission recognized that use of the undefined term "special damages" had resulted in uncertainty. Accordingly, the Commission recommended that the term "special damages" should be replaced by the term "past pecuniary loss" to describe pecuniary loss arising before judgment.[44]

On the issue of non-pecuniary loss, the British Columbia Commission accepted the argument that the full award of prejudgment interest would result in double compensation for loss due to inflation. Pointing out that non-pecuniary losses are adjusted for inflation to the date of trial, the Commission stated as follows:[45]

> To the extent that prejudgment interest attempts to compensate the plaintiff for loss of value of money, an award of prejudgment interest at market rates will compensate the plaintiff twice over for the loss of value of money—once when the principal value of the judgment is calculated, and again when interest is added to it.

Accordingly, the Commission recommended that interest on non-pecuniary loss should be awarded at a "real rate" of return, which was defined as the actual recovery of interest in times of stable currency. The Commission chose as the appropriate real rate 3.5 percent, which is the discount rate established by the Chief Justice of the Supreme Court under section 51(3)(b) of the *Law and Equity Act*.[46]

4. CONCLUSIONS

(a) General

Two different rationales may be advanced for an award of prejudgment interest. The first is a compensatory rationale that characterizes prejudgment interest as but one aspect of the primary goal of the tort system, that is, corrective justice through full compensation of the injured person for losses caused by the wrongdoer. From this perspective, an injured person is entitled to recompense for her loss as of the date of the injury, or as her losses arise, until the date of the resolution of the claim. If prompt payment had been made, the injured person would have been able to invest the moneys, or to avoid the cost of borrowing to cover expenses. Prejudgment interest is intended to compensate for the distinct loss that arises as a result of the injured person being kept out of that money. The compensatory purpose of prejudgment interest was recognized very early in the context of admiralty law, in the following statement by Dr. Lushington:[47]

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[44] *Ibid.*, at 54.

[45] *Ibid.*, at 61.

[46] R.S.B.C. 1979, c. 224, as am. by S.B.C. 1981, c. 10, s. 30.

[47] *The Amalia* (1864), 5 New Rep., at 164*n*.

> Interest is not given by reason of indemnification for the loss, for the loss was the damage which had accrued, but interest was given for this reason, namely, that the loss was not paid at the proper time. If a man is kept out of his money it is a loss in the common sense of the word, but of a totally different description and clearly to be distinguished from a loss which has occurred by damage done at the moment of a collision.

The compensatory rationale is not dependent on any notion of wrongful withholding or delay in payment by the defendant. Nor is the award of prejudgment interest intended to punish a wrongdoer. Indeed, since proof of loss by the injured person is a necessary element of the operation of the tort system, it is often entirely reasonable that payment by the wrongdoer should be delayed. The compensatory rationale simply recognizes that, without an award of prejudgment interest, the injured person would be undercompensated.

The alternative rationale offered for awards of prejudgment interest is that such awards are intended to encourage expeditious resolution of claims and proceedings. In the absence of prejudgment interest, a wrongdoer has an obvious, and often significant, incentive to delay payment to the injured person, in order to have the benefit of the continued use of the money. Accordingly, from the perspective of the settlement rationale, prejudgment interest is imposed as an incentive to achieve a quick resolution of the claim or action by, in effect, penalizing the defendant for delay.

The Commission recognizes that expeditious settlement of personal injury claims is an important goal that should be fostered. In our view, the ideal prejudgment interest rules should be neutral with respect to settlement behaviour, in the sense that such rules should operate in such a way that neither the injured person nor the wrongdoer can benefit from delaying settlement or resolution of the action. However, we reiterate our belief, expressed throughout this Report, that the goal of full compensation of the injured person should remain the paramount concern of the tort system. To the degree that there exists any tension between the goal of expeditious settlement and that of full compensation, compensation should take precedence.

This position has guided the policy choices embodied in the recommendations that follow. However, we are satisfied that the reforms proposed address the overall concerns that have been expressed with respect to the current operation of the prejudgment interest rules, and satisfy, to a large measure, the goals of both settlement and compensation.

(b) Time Period During Which Prejudgment Interest Accrues

As we have discussed, prejudgment interest currently begins to run from the date upon which written notice of a claim is given by the injured person to the wrongdoer. This rule was probably originally designed to

induce timely claims on the part of the injured person, and is consistent with the goal of expeditious settlement or resolution of the action. Nevertheless, the time period is subject to criticism from both the settlement and compensation perspectives.

From the point of view of compensation, the existing rule may be said to be unsatisfactory because it fails to compensate the injured person for the period between the date the loss was incurred and the date when written notice of the claim is given. The goal of full compensation requires that prejudgment interest be calculated from the date upon which the cause of action arose.

The Canadian Bar Association—Ontario ("C.B.A.O."), on the other hand, has proposed a change in the current rule that is clearly intended to encourage more expeditious resolution of claims. The Association has urged that prejudgment interest should not begin to accrue until a defendant can be reasonably expected to make payment of the claim.[48] The C.B.A.O. suggests that the appropriate time from which interest should run is the date upon which the injured person offers to submit to medical examination, since it is only then that the defendant has the information upon which to assess the validity of the claim.

As we have said, the Commission recognizes that wrongdoers and their insurers have a legitimate interest in avoiding undue delay in the resolution of claims. However, we are of the view that sacrificing full compensation in order to promote prompt settlement is unfair to the injured person, and contrary to the primary aim of tort law.

It may be entirely reasonable for an injured person to delay in making a claim; some injuries, for instance, can be slow in manifesting themselves. In the meantime, the wrongdoer or the insurance company has the use of the money. An injured person who unreasonably delays settlement or litigation may be penalized by use of other available mechanisms, including costs penalties and the exercise of the court's discretion with respect to the award of prejudgment interest. Occasional undue delay by some injured persons should not deprive the majority of claimants of the fair and proper measure of compensation.

We are not alone in this view. As discussed,[49] England, and all Canadian provinces that have provided for prejudgment interest awards in personal injury actions, have chosen the date upon which the cause of action arose as the relevant starting point for accrual of such interest.

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[48] See Canadian Bar Association—Ontario, Committee to Review Problems in the Casualty Insurance Industry, *Submission to the Ontario Task Force on Liability Insurance* (April, 1986), at 10.

[49] *Supra*, this ch., sec. 3.

For the reasons given above, we recommend that section 135(1) of the *Courts of Justice Act, 1984*[50] should be amended to provide that prejudgment interest should accrue from the date upon which the cause of action arises.[51]

(c) Rate of Interest on Pre-Trial Pecuniary Loss

As discussed, the rate of prejudgment interest currently awarded is the bank rate prevailing on "the first day of the last month of the quarter preceding the quarter" in which the action was commenced, rounded to the next higher whole number where the bank rate includes a fraction, plus one percent. This choice of prejudgment interest rate raises a number of issues.

The first relates to the date upon which the rate itself is established. A significant period of time, sometimes several years, can elapse from the date of the injury until the trial or settlement of an action. Interest rates can fluctuate widely during that period of time. Fixing the interest rate as of the last month prior to the quarter in which the action is commenced can lead to anomalies that, in turn, may affect settlement behaviour. Where interest rates fall after the action is commenced, the injured person has an incentive to delay in order to obtain the beneficial interest rate on the amount due. Conversely, where interest rates have risen, the wrongdoer may benefit from delay and the investment of the amount payable at a higher interest rate.

It has been suggested that a more precise award of damages, more accurately reflecting the injured person's actual loss, would be obtained by a revision of the interest rate at regular intervals during the period in which prejudgment interest is payable. We agree with this position. In order to reflect more closely changes in interest rates generally, we recommend that the prejudgment interest rate should be adjusted on a quarterly basis.[52]

The current choice of prejudgment interest rate, one percent above the bank rate, rounded up to the next highest percentage point, has been criticized. The current rate is approximately the same as that charged to corporate borrowers. Because the interest rate charged to other, non-corporate borrowers is generally higher, the current prejudgment rate may not fully compensate some injured persons who must borrow to meet expenses.

On the other hand, the wrongdoer or insurer would almost certainly earn less than the current prejudgment rate on short-term investments prior to judgment; an insurer would probably earn about two percent less than

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[50] *Supra*, note 5.

[51] See the draft *Courts of Justice Amendment Act* proposed by the Commission (hereinafter referred to as "draft CJA Act"), *infra*, Appendix 2, s. 3(1).

[52] *Ibid.*

that rate. Moreover, the current prejudgment interest rate is generally higher than the rate of return that can be earned by individuals on short-term investments, so that some injured persons who have not borrowed may be overcompensated.

It has been argued that injured persons do not generally borrow money, and that awarding a rate higher than they might otherwise earn encourages delay. It is also pointed out that, where an injured person is forced to borrow, the cost of such borrowing can be proved at trial, and awarded by the court as an aspect of special damages, or through the exercise of the court's discretion under section 140 of the *Courts of Justice Act, 1984* to depart from the usual rate.

On balance, we believe that, subject to the recommendation that follows, the appropriate prejudgment interest rate should be the average bank rate for each quarter, and we so recommend.[53]

It has also been suggested that the current prejudgment interest rate formula, which rounds a fractional rate up to the next percentage point, may increase unduly the amount of prejudgment interest payable to an injured person. The purpose of rounding up is apparently to simplify calculations. However, such an increase can represent a large amount of money over time and can result in significant overcompensation: a bank rate of 9.1 percent would be rounded up to ten percent, an increase of almost a full percentage point.

This seems difficult to support. Fairness requires a more precise calculation of the loss to the injured person, which could be achieved by rounding the bank rate, either up or down, to the nearest tenth of a percentage point. We so recommend.[54]

(d) Compound Interest

As discussed, existing prejudgment interest provisions prohibit the award of interest on interest, that is, compound interest. This prohibition may reflect a concern that compound interest involves complex calculations that can result in practical difficulties.[55] However, it has been strongly argued that the prohibition against awarding compound interest can result in significant undercompensation. If the injured person had been promptly paid, the money could have earned compound interest. While the defendant holds the money, compound interest may be earned. The difference

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[53] *Ibid.*, s. 2.

[54] *Ibid.*

[55] This appears to be the view taken by the English Law Commission, which opted to retain simple, rather than compound, interest: *supra*, note 23, at 45-47. See, also, *Sun Alliance Insurance Co. v. Alvin Keenan Ltd.* (1985), 32 A.C.W.S. 254 (N.B.C.A.).

between simple and compound interest can be significant. For example, if the prejudgment interest rate were ten percent, denial of compounding would reduce the effective rate to 9.1 percent on a three year debt.

We share the view expressed by the British Columbia Law Reform Commission that compounding prejudgment interest more accurately reflects the operation of the marketplace and the cost of delay to the injured person.[56] The calculation of compound interest has been simplified immeasurably by computerization and there would appear to be no reason to deny this method of ensuring full compensation. Accordingly, we recommend that prejudgment interest should be compounded, with quarterly calculations.[57]

(e) Interest on Non-Pecuniary Loss

As discussed, prejudgment interest is awarded at the same rate for both pecuniary and non-pecuniary losses. This practice has been criticized on the ground that it overcompensates the injured person. The $100,000 limit on non-pecuniary loss established by the Supreme Court of Canada is adjusted for inflation from the date of injury to the date of trial. Because commercial interest rates comprise not only an amount reflecting the "real rate" of interest, but also an amount reflecting the loss of the value of money over time, an award of prejudgment interest at the full prejudgment interest rate, in effect, allows double recovery in respect of the loss due to inflation.

The argument for a reduction of the current rate of prejudgment interest awarded on non-pecuniary losses seems to us compelling. There appears to be no good reason why an injured person should be doubly compensated for inflation. A person who, in 1978, suffers a non-pecuniary loss for which the maximum of $100,000 in non-pecuniary damages would be awarded, but who is not compensated until 1987, will receive almost $200,000. To paraphrase Lord Denning in *Birkett v. Hayes*,[58] that person was not kept out of $200,000 for nine years; she was only kept out of $100,000. We agree with the position taken by Holland J. in *Graham v. Persyko*,[59] the House of Lords in *Wright v. British Railways Board*,[60] the Province of Alberta,[61] and the British Columbia Law Reform Commission,[62] that prejudgment interest should be awarded only for that component that represents the "real rate" of interest.

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[56] B.C. Report, *supra*, note 33, at 31, discussed *supra*, this ch., sec. 3(b)(ii).

[57] Draft CJA Act, s. 3(1).

[58] *Supra*, note 29.

[59] *Supra*, note 12.

[60] *Supra*, note 29.

[61] Section 4(1) of the Alberta *Judgment Interest Act*, *supra*, note 31, provides that interest on non-pecuniary damages shall be calculated at the rate of 4% per year.

[62] B.C. Report, *supra*, note 33, at 64.

In taking this position, the Commission accepts that some awards—particularly awards for less serious injuries—may not be adjusted for inflation with the same degree of precision as maximum awards, which are directly referable to $100,000 in 1978. However, it is our view that this concern can be addressed through careful submissions by counsel, who can alert the courts to the assumption underlying the reduced interest rate, that is, that all awards have been properly adjusted for inflation. We fully expect that the courts will, over time, come to make the appropriate adjustments as a matter of general practice.

As to the appropriate "real rate", in *Graham v. Persyko*,[63] the Court awarded an interest rate of 2.5 percent for damages for non-pecuniary loss. This is the same rate used for discounting future losses.[64] On balance, this would appear to be a fair choice. Accordingly, a majority of the Commission recommends[65] that prejudgment interest should be awarded on damages for non-pecuniary loss at the rate specified in the Rules of Civil Procedure, from time to time, in respect of the discount rate, which, at present, would be 2.5 percent.[66]

(f) Special Damages

As discussed, the term "special damages" is undefined by the *Courts of Justice Act, 1984*, and its meaning is uncertain at common law. Such uncertainty is unnecessary. Accordingly, we recommend that section 138(2) of the *Courts of Justice Act, 1984* should be amended by replacing the term "special damages" with the term "past pecuniary loss".[67]

(g) Scope of Recommendations

Despite the limited scope of the present project, the foregoing recommendations in respect of prejudgment interest are not restricted to cases of personal injury or wrongful death. There seems to be no plausible argument for a distinction, on these questions, between different kinds of cases in which damages are awarded, and it would appear to be introducing an anomaly to set up such a distinction.

5. STATEMENT OF DISSENT AND EXPLANATION BY EARL A. CHERNIAK, Q.C.

I am unable to agree with the recommendation of my fellow Commissioners that prejudgment interest on non-pecuniary general damages

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[63] *Supra*, note 12, at 715.

[64] Rules of Civil Procedure, O. Reg. 560/84, r. 53.09.

[65] One of the Commissioners, Mr. Earl A. Cherniak, Q.C., dissents from this recommendation: see *infra*, this ch., sec. 5.

[66] Draft CJA Act, s. 3(1a).

[67] *Ibid.*, s. 3(2).

should accrue only at the rate of 2.5 percent, rather than the rate applicable to all other awards for past damages.

As we point out in the Report, the existing jurisprudence in Ontario combined with the statutory authority allows full prejudgment simple interest on non-pecuniary general damages. The cases which so held were fully argued and the present law represents the considered judgment of the Ontario Court of Appeal.

The basis advanced for the recommendation of the majority of the Commission is the proposition that non-pecuniary awards have already been adjusted for inflation by the Courts, and, therefore, the awarding of interest at a rate which contains an inflationary component amounts to double recovery.

This criticism, to the extent that it has validity, is true only of awards at the very top end of the range, since the maximum non-pecuniary award is adjusted regularly for inflation, as laid down by the Supreme Court of Canada in *Lindal*. There is no evidence to support the proposition that other awards, especially in the middle and low ranges, are being similarly adjusted. Judges do not mentally calculate what an award would have been in 1978 and add an inflation factor, nor can most awards be categorized so that such a comparison could be made. Personal injury awards are case specific and not injury specific. The same injury may affect different individuals quite differently. The Court must consider not only the injury, but also the particular evidence brought before it in the individual case. Judges have been warned repeatedly by Appellate Courts that there is not a sliding scale of awards between zero and the maximum. Factors which may have contributed to an award in 1978 may well have changed in such a way as to make a 1987 comparison inappropriate. Advances in medicine in many areas have dramatically changed the prognosis for many injuries. Even in those areas where there is thought to be some degree of uniformity, the "typical" flexion extension injury, it is far from clear, for instance, that the $10,000 case in 1983 has been adjusted upwards by inflation. The experience of most counsel who practise in the area is to the contrary. There is certainly no jurisprudence to indicate that trial judges consciously make any such adjustment.

In these circumstances, restricting prejudgment interest to 2.5 percent is a retrograde step. In those cases where non-pecuniary damages are the largest part of the claim, such a provision will be a disincentive to defendants to settle, since a defendant can earn far greater interest on her money or an insurer on its reserve by delaying payment as long as possible. This disincentive and the resulting injustice to plaintiffs was the primary reason why prejudgment interest reform came about in the first place, and one of the principal reasons why the Court in *Borland* rejected the double recovery argument.

A defendant who is concerned about double recovery and wishes to avoid it, always has the option of estimating the non-pecuniary damages

and prepaying them, thus stopping both the interest and the inflation clock running as of the date of the payment, to the extent that there has been a realistic estimate of the damages. The estimate is especially easy in cases which call for the maximum award, where the money is usually also most needed, for these cases are often readily identifiable.

Even in the case of the maximum award, the double recovery argument is not necessarily valid. It was pointed out to the Court of Appeal in *Borland* that the plaintiff, had she been paid the maximum award to which she was held to be entitled as it was on the date of the accident, could have used the money to purchase a residence (a common and wise use of such funds for disabled persons), lived rent free, and obtained the benefits of inflation by virtue of the appreciation in value of the property.

These factors have persuaded me that no case for reform has been made out.

I do, however, recognize that there is a perception, particularly among insurers, that there is double recovery, and that my fellow Commissioners have found this argument persuasive. In addition, the recommendation to change the prejudgment interest rule to mandate compound interest is long overdue and I fully support it.

There is a middle ground that would, if adopted, for all practical purposes eliminate the risk of double recovery, and yet not create the potential for injustice that a blanket 2.5 percent rate creates. While I recognize that the formula that I propose is not a perfect solution, I believe that it achieves a greater measure of rough justice, and allows for more flexibility than the current recommendation.

As I have pointed out, we do not know, and there is no empirical evidence to indicate whether, and if so which, awards, if any, other than the maximum award, are being adjusted for inflation. We do know, however, that any award in excess of $100,000 must contain an inflation component of at least the amount in excess of $100,000. We also know from practical experience that small awards for less serious injuries have not increased, or at least not significantly increased, since 1978, so that an award of interest at less than the full rate in these cases will result in undercompensation unless judges consciously make an effort to adjust these awards for inflation.

The formula that I propose is not novel. In part, it was used by Montgomery J. in *De Champlain v. Etobicoke General Hospital* (1985), 34 C.C.L.T. 89.

If there is to be any change, I propose that prejudgment interest for non-pecuniary damages should be awarded on a maximum award at the rate of 2.5 percent. For all other awards, prejudgment interest should be calculated:

—at the full rate on the first $100,000;

—at 2.5 percent on any amount that exceeds $100,000; and

—provided that no award should exceed the maximum award for non-pecuniary loss (including prejudgment interest at 2.5 percent) that could have been awarded for the same period of time.

With this formula, there is still a risk of double compensation for inflation on some awards, but this can be avoided if the Court takes the inflation and interest factors into account in setting the awards, and is preferable to undercompensation with respect to other cases, particularly in the lower and middle ranges which comprise the vast majority of awards. The use of the 2.5 percent rate on amounts over $100,000 will eliminate any possibility of serious overcompensation.

In summary, in my view the case for change is not made out. To the extent that others are convinced that a case for reform has been made, a reduced interest rate should be applicable only to that part of a non-pecuniary award over $100,000.

RECOMMENDATIONS

The Commission makes the following recommendations:

1. Section 138(1) of the *Courts of Justice Act, 1984* should be amended to provide that prejudgment interest should run from the date upon which the cause of action arises.

2. Prejudgment interest rates should be set quarterly.

3. The rate of prejudgment interest should be equal to the average bank rate for each quarter, rounded to the nearest one-tenth of a percentage point.

4. Prejudgment interest should be compounded, with quarterly calculations.

*5. Prejudgment interest should be awarded on damages for non-pecuniary loss at the rate specified in the Rules of Civil Procedure, from time to time, in respect of the discount rate, which, at present, would be 2.5 percent.

6. Section 138(2) of the *Courts of Justice Act, 1984* should be amended by replacing the term "special damages" with the term "past pecuniary loss".

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* One of the Commissioners, Mr. Earl A. Cherniak, Q.C., dissents from this recommendation: see *supra*, this ch., sec. 5.

CHAPTER 8

MISCELLANEOUS ISSUES

In this chapter, we shall consider three matters that affect the assessment of damages: the impact of so-called "contingencies"; the application of the discount rate; and the award of a management fee.

1. CONTINGENCIES

(a) The Present Law

In assessing damages for personal injury, courts are required to make necessarily speculative predictions about what the injured person would have done if the injury had not occurred and about the future needs of that person as a result of the injury. For example, in order to assess the value of the injured person's earning capacity, the court must assess the chances that he would have been promoted, or that he would have acquired improved skills so as to increase his income. In order to assess damages for cost of future care, other predictions must be made with respect to the nature and level of care that the injured person will require.

It has been the practice of courts to make adjustments in personal injury damage awards for what are referred to as "contingencies". In so doing, courts have recognized that predictions regarding future income and future cost of care are, in essence, best guesses, and that account must also be taken of the "ordinary vicissitudes of life", such as illness or interruptions in employment, that may not be predictable with respect to a particular individual, but that generally affect most people from time to time.

The principle of adjusting personal injury damage awards for contingencies was articulated in *Phillips v. London and South Western Railway Co.*,[1] where Brett L.J. stated:

> As to compensation for money loss for the time to come, supposing there had been no accident, there are a thousand circumstances which might have prevented the plaintiff from earning a fixed income. He would be subject to the ordinary vicissitudes of trade.... No doubt the jury are wrong if they do not consider those circumstances as upon the doctrine of chances. You cannot give evidence of them, and a [j]udge can only leave it at large to the jury, telling them that these circumstances and possible chances must be taken into account....

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[1] (1879), 49 L.J. Q.B. 233, at 237, [1874-80] All E.R. 1176 (C.A.).

> I agree that it is a wrong direction to tell the jury that the proved income is the basis, in the sense that it is the only basis of compensation.

The practice of adjusting for contingencies was confirmed by the Supreme Court of Canada in *McKay v. Board of Govan School, Unit No. 29 of Saskatchewan*,[2] where the Court approved the following instructions that had been given to the jury with respect to contingencies:[3] "damages must take into consideration, in varying degrees according to the circumstances, the many contingencies of life, its misfortunes as well as its good fortunes".[4]

The practice, in effect until recently, of assessing damages globally discouraged precision in quantifying the effect of contingencies.[5] However, since the Supreme Court of Canada judgment in *Andrews v. Grand & Toy Alberta Ltd.*,[6] which endorsed the itemization of damage awards, the courts have given more careful consideration to the issue of contingencies.

In *Andrews*, Dickson J., as he then was, observed that "[t]his whole question of contingencies is fraught with difficulties, for it is in large measure pure speculation",[7] and that "[t]he figure used to take account of contingencies is obviously an arbitrary one".[8] Nevertheless, in *Andrews* and in *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*,[9] the practice of adjusting for contingencies was reaffirmed, and guidelines were established for assessing such contingencies.

Dickson J. emphasized that an adjustment for contingencies is not mandatory;[10] rather, the adjustment will depend on the facts of the individual case, with particular reference to the nature of both the injury and the occupation, as well as the age, of the injured person.[11]

Although courts had almost invariably made adjustments only with respect to adverse contingencies, the Court in *Andrews* pointed out that

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[2] *McKay v. Board of Govan School, Unit No. 29 of Saskatchewan*, [1968] S.C.R. 589, 68 D.L.R. (2d) 519 (subsequent references are to 68 D.L.R. (2d)).

[3] *Ibid.*, at 527.

[4] *Ibid.*, quoting *Warren v. King*, [1964] 1 W.L.R. 1, [1963] 3 All E.R. 521 (C.A.).

[5] Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at 47-48.

[6] *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452 (subsequent references are to 83 D.L.R. (3d)).

[7] *Ibid.*, at 468.

[8] *Ibid.*, at 470.

[9] *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480 (subsequent references are to 83 D.L.R. (3d)).

[10] *Ibid.*, at 489.

[11] *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, note 6, at 470, and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, *supra*, note 9, at 489.

"not all contingencies are adverse".[12] Dickson J. referred with approval to a decision of the High Court of Australia in which it had been asked rhetorically: "Why count the possible buffets and ignore the rewards of fortune?"[13] In that case, the Australian High Court had also observed that each case depends on its own facts and that in some cases "it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad".[14]

The Ontario Court of Appeal took a similar view in the third case of the personal injury "trilogy", *Arnold v. Teno*,[15] where it refused to discount the award for contingencies with respect to future care. Zuber J.A. observed that, in that case, there was "[a] real possibility of extra expenses for special recreation, special education, transportation, special clothing, extra vacation costs...and in countless small matters", and held that "the contingencies tending to increase damages are sufficient to outweigh the contingencies which would diminish damages, and lead to a moderate increase".[16] The Supreme Court of Canada in *Arnold v. Teno* left the issue of contingencies undisturbed.[17]

The Court held that, since damages are to be itemized, rather than assessed globally, contingencies should be calculated separately for loss of earning capacity and for future care. As to loss of earning capacity, Dickson J. stated that a court should consider particularly the nature of the injured person's occupation or the industry in which she is employed, in order to determine the likelihood of such events as layoffs, unemployment, and injuries.[18] He suggested, however, that generally the percentage deduction with respect to loss of future earnings will be small.[19]

With respect to future care, the Court in *Thornton* explained that contingencies of this kind are distinct from those that might affect future earnings, in that contingencies for future care relate essentially to the duration of the expense.[20] Dickson J. noted, for example, with respect to

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[12] *Supra*, note 6, at 470.

[13] *Bresatz v. Prizibilla* (1962), 108 C.L.R. 541 (H.C.), at 544, quoted in *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, note 6, at 470.

[14] *Bresatz v. Prizibilla*, *supra*, note 13.

[15] *Arnold v. Teno* (1976), 11 O.R. (2d) 585, 67 D.L.R. (3d) 9 (C.A.) (subsequent references are to 67 D.L.R. (3d)).

[16] *Ibid.*, at 30.

[17] *Arnold v. Teno*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609 (subsequent references are to 83 D.L.R. (3d)).

[18] *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, note 6, at 470, and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, *supra*, note 9, at 489.

[19] *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, note 6, at 470, referring to Prevett, "Actuarial Assessment of Damages: The Thalidomide Case—I" (1972), 35 Mod. L. Rev. 140, at 150.

[20] *Supra*, note 9, at 488.

home care, that "the duration of such care may be affected by such contingencies as difficulty in staffing a self-contained establishment or the need to enter hospital for special treatment".[21]

In *Andrews*, Dickson J. expressed regret about the lack of evidence upon which to determine contingencies in that case, and observed that "[c]ontingencies are susceptible to more exact calculation than is usually apparent in the cases".[22] He clearly encouraged the use of actuarial evidence at trial in order to obtain some degree of specificity.[23]

The Court in *Andrews* cautioned that, in order to ensure full compensation, care must be taken in assessing the appropriate contingencies not to duplicate reductions that have already been made in the original assessment of either future earnings or future care. Dickson J. pointed out, for example, that "contingencies implicitly are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this figure is a projection with respect to the real world of work, vicissitudes and all".[24] Similarly, since account is taken of decreased life expectancy in the original assessment of future care, damages should not be discounted again for this factor when contingencies for future care are being determined.[25]

As a final qualification with respect to adjustments for contingencies, the Court observed that "there are many public and private schemes which cushion the individual against adverse contingencies",[26] presumably referring to the wide availability of such benefits as unemployment insurance, sick pay, and disability pensions.

(b) Conclusions

The practice of discounting for contingencies gives rise to two concerns. First, it is said that the deduction appears arbitrary and results in excessive

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[21] *Ibid.*

[22] *Supra*, note 6, at 470.

[23] *Ibid.*, at 470, referring to Traversi, "Actuaries and the Courts" (1956), 29 Austl. L.J. 557.

[24] *Supra*, note 6, at 470.

[25] *Ibid.*, at 467. In *McErlean v. Sarel*, unreported (September 19, 1987), the Ontario Court of Appeal found that the plaintiff would require cost of care based on a standard of home care for twenty years, but that circumstances would mandate institutional care for the balance of his life. Specific evidence was introduced with respect to the reduced cost of institutional care that would be required after 20 years. The Court pointed out, at pages 58-59, that this adjustment was, in effect, an adjustment for contingencies, which could have been made alternatively by deducting a percentage of an award for future care that contemplated home care for the plaintiff's entire life. The Court regarded the more specific calculation of damages to be less arbitrary in the circumstances of the case.

[26] *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, note 6, at 470.

reductions of damage awards: critics point out that, in both *Andrews*[27] and *Thornton*,[28] deductions for contingencies of twenty percent with respect to future earnings were left undisturbed—a particularly bleak prediction when one considers that this represents the equivalent of one day per week of a person's working life. Secondly, there exists the possibility of conflict with, or duplication of, reductions that have already been made in the original assessment.

There is some evidence that tends to support the first concern. A number of statistical studies have indicated that the appropriate deduction for contingencies with respect to income loss is far lower than those that have been commonly applied. A study of the Australian statistics concludes as follows:[29]

> [T]he maximum possible allowance in the average case of a man in regular employment for contingencies other than death causing loss of income appears to be no more than 6 per cent, being about 3.5 per cent for unemployment and 2.5 per cent for the other contingencies.

An analysis of the English statistics suggests a range of two to six percent.[30] This has been followed by a suggestion of the English Law Commission that a range of two to four percent should be adopted.[31] In Canada, one commentator has suggested, based on higher Canadian unemployment rates, that approximately eight percent (5.5 percent unemployment and 2.3 percent sickness) would be appropriate.[32]

Undoubtedly, part of the difficulty experienced by the courts in calculating contingencies has been caused by the insufficiency, or complete absence, of evidence with respect to such matters. In *Andrews*, however, Dickson J. clearly welcomed the use by the Court of statistical and actuarial evidence on questions of contingencies, stating that this is an area to which such evidence is particularly suited.

In light of this statement by the Supreme Court of the relevance of statistical and actuarial evidence, it is clear that evidence of this sort can, and should, be called in order to avoid excessive deductions for contingencies. Because of the sensitivity of such evidence to changes in the economy and

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[27] *Supra*, note 6.

[28] *Supra*, note 9.

[29] Luntz, *Assessment of Damages for Personal Injury and Death* (2d ed., 1983), para. 6.4.15, at 300. See, also, Traversi, *supra*, note 23, at 561, concluding that 2% would be an accurate deduction.

[30] Street, *Principles of the Law of Damages* (1962), at 120-25.

[31] England, The Law Commission, *Personal Injury Litigation—Assessment of Damages*, Working Paper No. 27 (1970), Appendix B, para. 27.

[32] Bruce, "The Calculation of Foregone Lifetime Earnings: Three Decisions of the Supreme Court of Canada" (1979), 5 Can. Pub. Policy 155, at 158-60.

progress in medical knowledge, and because contingencies depend on the facts of the particular case, we believe that it would be inappropriate to legislate a particular percentage deduction to be applied in all cases. In our view, a degree of flexibility is necessary, which legislation cannot provide.

As to the concern about inconsistent and duplicative deductions for contingencies, it has been suggested that this danger would be reduced by requiring the court to specify precisely the contingency that is contemplated, and the evidence upon which it is based, at the time that losses are itemized and assessed, rather than making a general reduction at the end of the calculation. Again, we are of the view that legislation to this effect is unnecessary and would probably not alter the result in most cases. In light of the clear cautionary note raised by Dickson J. in *Andrews*,[33] we expect that the courts are alive to the possibility of discounting doubly for contingencies. In our view, careful submissions by counsel in this regard will be more effective than a statutory direction to the court, which would be difficult to draft and might have unanticipated side effects.

In conclusion, while the issue of contingencies is a difficult one involving, of necessity, an element of arbitrariness,[34] we are of the view that the guidelines and cautions issued by the Supreme Court of Canada clearly afford the courts sufficient direction and flexibility to arrive at a more precise and fair assessment of the appropriate deduction for contingencies in each case than had previously been possible. In our view, the responsibility lies with counsel to ensure that sound statistical and actuarial evidence, based on the facts of each case, is introduced with respect to contingencies, including the effect of such factors as disability or unemployment schemes to which the tort victim would otherwise have contributed, and which might have cushioned him from life's "vicissitudes". Moreover, it is incumbent on counsel to assist the courts so that double discounting for contingencies may be avoided.

2. DISCOUNT RATE

In an earlier chapter,[35] we rejected the introduction of a system of periodic payments, and recommended continuation of the requirement that damages be awarded in the form of a lump sum, except where all the affected parties consent.[36] The practice of awarding damages for future pecuniary loss as a lump sum, whether as compensation for loss of earning capacity or cost of care, involves the determination of the present value of the future flow of payments necessary to compensate that loss.

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[33] *Supra*, note 6, at 470.

[34] See the statement of Dickson J. in *Andrews v. Grand & Toy Alberta Ltd.*, *ibid.*, quoted *supra*, text accompanying note 8.

[35] *Supra*, ch. 5, sec. 4.

[36] *Courts of Justice Act, 1984*, S.O. 1984, c. 11, s. 129.

In determining the present value of future losses, it would be inappropriate for a court simply to assess the plaintiff's annual loss and multiply it by the number of years during which the loss will be suffered. Since the plaintiff will receive the award in respect of the future losses immediately, and will earn interest on it,[37] the amount must be discounted. Otherwise, the plaintiff will be overcompensated at the expense of the defendant.

In the absence of inflation, the present value of the future payments could be calculated easily by discounting the award by the actual amount of interest the plaintiff could be expected to receive by investing the award, an amount known as the "nominal interest rate". However, inflation is an economic reality, and this complicates the determination of the discount rate.

The need to take account of inflation, which has been clearly recognized by the Supreme Court of Canada,[38] arises from the fact that the nominal interest rate paid by a borrower not only involves payment of interest for use of the money—known as the "real interest rate"—but incorporates an element of payment to account for the expected decline in the value of money over the period of the loan.[39] Accordingly, if the expected inflation rate over one year is five percent, the nominal interest rate for a one year term will be approximately five percent plus whatever the market determines as the appropriate "rent" for the use of the money. Assuming that the latter is three percent, the prevailing nominal interest rate would be approximately eight percent.

If the nominal rate were used to discount damage awards, however, plaintiffs would receive no protection from inflation, and inevitably would be undercompensated. While a plaintiff would be able to invest the award at eight percent, five percent of that return would be designed to compensate for the effect of inflation, and would not represent a gain in real terms.[40]

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[37] In calculating the lump sum required to compensate the plaintiff for a future stream of payments, it is commonly assumed that the plaintiff will invest the money so that it earns income. Consequently, the objective is to provide a sum that, when invested, will produce an annual blended payment, composed partly of interest and partly of capital, and that will be exhausted at the end of the period for which compensation is given. Where there is a so-called "self-extinguishing fund" compensating loss over a long period, the annual payments will be composed mostly of interest in the early years, and will consist mostly of capital towards the end of the period. If the plaintiff were awarded a sum that would yield income every year equal to the amounts required to compensate the loss, the plaintiff would be left with a lump sum at the end of the period.

[38] *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, note 6, and *Lewis v. Todd*, [1980] 2 S.C.R. 694, 115 D.L.R. (3d) 257 (subsequent references are to [1980] 2 S.C.R.).

[39] Without an increment in the interest rate to account for anticipated inflation, a lender would not be assured of receiving back a principal amount worth the same in real terms as at the time the loan was made.

[40] The undiscounted award is based on the plaintiff's future losses valued in real terms as of the date of trial. For example, suppose that a court determines that over the coming year the plaintiff should be compensated for a loss of $10,000 in real terms, that is,

There are two theoretically correct ways of determining the appropriate discount rate to apply to the award. Either one can increase the award of damages to ensure that the amount of the flow of future payments increases commensurately with the rate of inflation and then discount it by the nominal rate of interest, or one can calculate the value of the future losses without reference to the impact of inflation on the value of those losses, and then discount by the real rate of interest.

As we have indicated, the Supreme Court of Canada has decided that, in order to avoid undercompensation, account should be taken of future inflation in determining the discount rate to be applied to an award of damages. In *Andrews v. Grand & Toy Alberta Ltd.*,[41] Dickson J. held that the discount rate should be the real rate of interest, which is to be calculated by subtracting the projected long-term rate of inflation from the present nominal rate of return on long-term investments. In *Andrews*, the evidence indicated that "high quality long-term investments" were yielding a rate of return in excess of ten percent and that a forecast of the rate of inflation over the long term was 3.5 percent. Mr. Justice Dickson thus used a discount rate of seven percent to determine the present value of the award for loss of earnings and for future care. He did not attempt to establish that a discount rate of seven percent should be used as a general rule, but said that "[t]he result in future cases will depend upon the evidence adduced in those cases".[42] The same discount rate was applied by the Supreme Court of Canada in *Arnold v. Teno*[43] and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*.[44] While there was an initial tendency among some lower courts to consider themselves bound by the seven percent discount rate,[45] the Supreme Court of Canada subsequently reaffirmed that the selection of a discount rate is a question of fact that is to be determined on the evidence presented at trial.[46]

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enough to buy what $10,000 would buy at the time of trial. If the plaintiff is awarded $10,000 less the prevailing nominal interest rate of 8%, or $9,200, and invests it at 8%, she will receive approximately $10,000 at the end of one year. However, if the rate of inflation during that year is 5%, this ultimate amount of $10,000 will buy goods and services worth only $9,500 in real terms at the end of the year. The plaintiff will have thus been undercompensated. This occurs because the undiscounted award assessing the value of the plaintiff's future loss has not been increased to account for inflation, but is being reduced by a discount figure that includes the rate of inflation, rather than by an amount that reflects only the real rate of return that the plaintiff can expect from investing the award.

[41] *Supra*, note 6.

[42] *Ibid.*, at 474.

[43] *Supra*, note 17.

[44] *Supra*, note 9.

[45] See, for example, *Conklin v. Smith*, [1978] 2 S.C.R. 1107, 88 D.L.R. (3d) 317; *Trizec Equities Ltd. v. Guy* (1978), 85 D.L.R. (3d) 634, 40 A.P.R. 1 (N.S.S.C., App. Div.), rev'd [1979] 2 S.C.R. 756, 99 D.L.R. (3d) 243; and *Lewis v. Todd* (1978), 5 C.C.L.T. 167 (Ont. C.A.), rev'd *Lewis v. Todd*, *supra*, note 38.

[46] *Lewis v. Todd*, *supra*, note 38, at 709. Dickson J. commented as follows (at 710-11):

The approach that has been adopted by the Supreme Court of Canada may usefully be compared to that followed in England and Australia. In England, the method of discounting lump sum awards to arrive at present value is to reduce the "multiplier", that is, the number of years by which the plaintiff's anticipated annual loss is multiplied. Leaving aside the impact of inflation, this method should not produce an amount different than that produced by simply reducing the total award by the nominal rate of interest.[47] With respect to inflation, English courts, although acknowledging the problem caused by the prospect of inflation, have traditionally been more skeptical about their ability to estimate future trends so that inflation can accurately be taken into account.[48] Their initial response, exemplified by the decision of Diplock L.J., as he then was, in *Fletcher v. Autocar and Transporters Ltd.*,[49] was to ignore inflation. In the last twenty years, however, both the English courts and Lord Diplock have refined their approach. It is now accepted that inflation cannot simply be disregarded.[50] The approach that has been adopted avoids the difficulty of trying to predict future trends in inflation. Usually referred to as the "Diplock approach", it was articulated by Lord Diplock in *Mallett v. McMonagle*[51] as follows:[52]

> [T]he only practicable course for courts to adopt in assessing damages awarded under the Fatal Accidents Acts is to leave out of account the risk of further inflation, on the one hand, and high interest rates which reflect the fear of it and capital appreciation of property and equities which are the consequence of it, on the other hand.

Thus, the impact of inflation is not to be explicitly calculated: in determining the present value of the lump sum damage award, courts are to use not the prevailing interest rates, which "reflect the fear" of inflation, but "interest rates appropriate to times of stable currency such as 4 per cent to 5 per cent".[53] This approach was subsequently reaffirmed by the House of Lords.[54]

> I know of no authority by which this Court, if so minded, could legislate a fixed discount rate, applicable for all cases.... The principle remains that, absent legislation ... which directs the manner of calculating discount rate ... the discount rate will vary according to the expert testimony led at trial.

[47] Waddams, *The Law of Damages* (1983), paras. 421-23, at 246-48.

[48] See, for example, *Young v. Percival*, [1975] 1 W.L.R. 17, [1974] 3 All E.R. 677 (C.A.).

[49] *Fletcher v. Autocar and Transporters Ltd.*, [1968] 2 Q.B. 322, at 348, [1968] 1 All E.R. 726 (C.A.).

[50] *Taylor v. O'Connor*, [1971] A.C. 115, at 129-130, [1970] 1 All E.R. 365 (H.L.).

[51] *Mallett v. McMonagle*, [1970] A.C. 166, [1969] 2 All E.R. 178 (H.L.) (subsequent references are to [1970] A.C.).

[52] *Ibid.*, at 176.

[53] *Ibid.*

[54] *Lim Poh Choo v. Camden and Islington Area Health Authority*, [1980] A.C. 174, [1979] 3 W.L.R. 44 (H.L.), and *Cookson v. Knowles*, [1979] A.C. 556, [1978] 2 W.L.R. 978 (H.L.).

This approach is not very different from that, outlined above, of calculating the real rate of interest in order to discount the award to present value. It has been suggested, however, that rather than interest rates in times of stability, Lord Diplock should have used rates when inflation is zero.[55] This would result in a discount rate of closer to three percent. This criticism seems to be confirmed by a report issued under the auspices of the British Government Actuary's Department,[56] which recommended a discount rate of between 2.5 to 3.5 percent, based on the interest available on Index-Linked Government Stocks, the redemption value and dividends of which are adjusted from time to time so as to maintain the real value of the stock in the face of inflation.[57]

In Australia, courts shared the English doubt about their ability to predict future trends in inflation accurately so that inflation could be taken into account directly.[58] In fact, for several years after inflation began accelerating in the mid-1970's, many courts used prevailing interest rates to discount the award to present value. Although certain courts had adopted the "Diplock approach" at an early stage,[59] it was not until 1981 that it was authoritatively recognized by the High Court of Australia that some adjustment had to be made to the discount rate in order to take account of inflation.[60] However, in that case, a majority of the Court could not agree on what discount rate should be applied. The resulting confusion was ended by *Todorovic v. Waller*, in which the High Court fixed the discount rate at three percent, and held that no further allowance was to be made for inflation.[61]

The approach to the discount rate that was adopted by the Supreme Court of Canada in *Andrews v. Grand & Toy Alberta Ltd.* required the presentation, in every case, of expert evidence concerning inflationary trends and interest rates. This increased the cost of litigation for the parties, and led to a certain degree of inconsistency. Moreover, the determination

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[55] Rea, "Inflation, Taxation and Damage Assessment" (1980), 58 Can. B. Rev. 280, at 285.

[56] Working Party of Government Actuary's Department, *Personal Injury and Fatal Accident Cases* (1984), reprinted in part in (1984), 134 New L.J. 454.

[57] However, in *Spiers v. Halliday*, *Times*, London (June 30, 1984), it was held that this report was not admissible in evidence.

[58] See, for example, *O'Brien v. McKean* (1968), 118 C.L.R. 540 (H.C.), and *Barrell Insurances Pty. Ltd. v. Pennant Hills Restaurants Pty. Ltd.* (1981), 145 C.L.R. 625, 34 A.L.R. 162 (H.C.). For a detailed discussion of the discount rate issue in Australia, see Luntz, *supra*, note 29, sec. 7.4, at 326-39.

[59] See, for example, *Lindsley v. Hawkins*, [1973] 2 N.S.W.L.R. 581 (C.A.), var'd (1974), 4 A.L.R. 697 (H.C.).

[60] *Barrell Insurances Pty. Ltd. v. Pennant Hills Restaurants Pty. Ltd.*, *supra*, note 58.

[61] (1981), 150 C.L.R. 402, 37 A.L.R. 481 (H.C.). This rate was also intended by the Court to take account of the tax that would have to be paid on the damage award, an adjustment necessitated by the Australian courts' adoption of the *Gourley* rule: see discussion *supra*, ch. 2, sec. 7(a). In Queensland, a 5% discount rate was prescribed by the *Common Law Practice and Limitation of Actions Amendment Act*, 1981, No. 87 of 1981, s. 5.

was inherently wasteful, for there were no facts peculiar to individual cases to be determined in setting the discount rate. Indeed, there was a general consensus among economists that there was a more or less fixed gap between the anticipated nominal rate of interest and the anticipated rate of inflation over the long term, based on historical data with respect to past performance.[62]

Among the provinces and territories, several jurisdictions, including Ontario, responded to the problem of unnecessary transaction costs by legislating a discount rate. In 1980, Ontario became the first jurisdiction to specify a discount rate. Following study by a special committee,[63] the Supreme Court of Ontario Rules of Practice were amended by a rule providing for a discount rate of 2.5 percent.[64] The current version of this rule appears in the Rules of Civil Procedure as follows:[65]

> 53.09 The discount rate to be used in determining the amount of an award in respect of future pecuniary damages, to the extent that it reflects the difference between estimated investment and price inflation rates, is 2 1/2 per cent per year.

This rule was intended to reflect the difference between the nominal rate of interest on long-term investments and the predicted rate of future inflation.[66]

Certain other jurisdictions also have chosen a legislative response to the discount rate problem. In New Brunswick[67] and Nova Scotia,[68] a discount rate of 2.5 percent has been fixed by the respective court rules in precisely the same terms as the present Ontario rule; in Saskatchewan, the Queen's Bench Rules have fixed a rate of three percent, "[e]xcept where there is evidence to the contrary".[69] In 1981, a discount rate of 2.5 percent was fixed

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[62] See, for example, Rea, *supra*, note 55, at 283.

[63] See *Report to the Committee of the Supreme Court of Ontario on Fixing Capitalization Rates in Damage Actions* (February 14, 1980) (hereinafter referred to as "Committee Report").

[64] Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540, r. 267a, added by O. Reg. 379/80, s. 3. See, also, *The Judicature Amendment Act, 1979*, S.O. 1979, c. 65, s. 6(5), which authorized the rule.

[65] Rules of Civil Procedure, O. Reg. 560/84, r. 53.09.

[66] Committee Report, *supra*, note 63, at 5.

[67] Rules of Court, Reg. 82-73, r. 54.10(2). See, also, *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 73(1)(j), as en. by S.N.B. 1981, c. 36, s. 13, which authorized the rule.

[68] Civil Procedure Rules, r. 31.10(2). See, also, *Judicature Act, 1972*, S.N.S. 1972, c. 2, s. 42(fa), as en. by S.N.S. 1980, c. 54, s. 4, which authorized the rule.

[69] The Queen's Bench Rules, r. 284B(1)(b). See, also, *The Queen's Bench Act*, R.S.S. 1978, c. Q-1, s. 89(1)(g.1), as en. by S.S. 1983, c. 59, s. 15, which authorized the rule.

by ordinance in the Northwest Territories.[70] Recently, in Manitoba, *The Judgment Interest and Discount Act*, which specifies a discount rate of three percent, came into force.[71]

In British Columbia, a somewhat different solution has been adopted, insofar as the *Law and Equity Act* authorizes the establishment by regulation of two discount rates.[72] One discount rate is "deemed to be the future difference between the investment rate of interest and the rate of increase of earnings due to inflation and general increases in productivity". The other is "deemed to be the future difference between the investment rate of interest and the rate of general price inflation". The former rate is used to calculate loss of dependency under the *Family Compensation Act*,[73] and the present value of lost earnings; a rate of 2.5 percent has been established. The latter discount rate is applied to the determination of all other kinds of future damage; a rate of 3.5 percent has been fixed.[74]

In Ontario, and indeed elsewhere, the adoption of a rule fixing the discount rate undoubtedly has reduced the cost of litigation by rendering it unnecessary in many cases to hear economic evidence about the rate of interest and the rate of inflation. Presumably, the duration of personal injury trials has been reduced as well. In addition, by eliminating uncertainty, in theory, the rule should facilitate settlements. However, where it is necessary to "gross-up" the future care award, evidence about inflation, rates of return, and taxation will continue to be relevant.[75]

In large measure, the efficacy of the approach adopted in Ontario rests on adherence to the specified discount rate. In *McDermid v. The Queen*,[76] however, the Court departed from the rule, and applied a different discount rate. In that case, the evidence indicated that the short-term real rate of interest was substantially higher than the 2.5 percent discount rate. Mr. Justice Rosenberg was of the view that, although the language of rule 53.09 was mandatory, the evidence made it just to deviate from the rule in the

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[70] *Judicature Ordinance*, R.O.N.W.T. 1974, c. J-1, s. 47(1), as en. by O.N.W.T. 1981, c. 9 (3d), s. 3.

[71] S.M. 1986, c. 39, s. 9. The 3% rate is "deemed to be the percentage difference between the long-term rate of return on safe, but productive, investments and the long-term rate of general price inflation".

[72] *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 51, as en. by S.B.C. 1981, c. 10, s. 30.

[73] R.S.B.C. 1979, c. 120.

[74] B.C. Reg. 352/81.

[75] Of course, this would not be the case should our recommendations respecting gross-up be implemented: see *supra*, ch. 4, sec. 3(d)(ii).

[76] (1985), 53 O.R. (2d) 495, 5 C.P.C. (2d) 299 (H.C.J.). In *Davies v. Robertson* (1984), 5 O.A.C. 393 (C.A.), a rate of 2% was used; since it was intended to reflect productivity, it was not a departure from r. 53.09.

special circumstances of the case. He concluded that rule 2.03 authorized him to disregard rule 53.09.[77]

If applied, *McDermid v. The Queen* would seriously undermine the cost and efficiency advantages attendant upon prescribing a discount rate. In our view, the case should not be followed. We note that a recent High Court decision, *Crew v. Nicholson*, has expressly elected not to follow *McDermid*, for reasons with which we entirely agree:[78]

> For the Court to adopt a discount rate other than two and a half percent is to invite a return to the same kind of speculation that existed before Rule 53.09 and its predecessor was introduced. The drafters of the rule knew it would not always accurately reflect the real return on capital over certain periods. It will always be possible to show that for a period in the past the two and one half percent rate has not been accurate, and so to predict that it is unlikely to be accurate for some period in the future. That kind of speculation and uncertainty the rule was designed to eliminate.

It is our opinion that the present rule dealing with the discount rate should continue to apply to all cases of future loss. We therefore recommend that there should be no change in the law governing discount rates in Ontario.

Nonetheless, we are of the view that it would be useful to require regular review of the discount rate in order to ensure that it remains reasonably consistent with economic reality. Accordingly, we further recommend that, at least once every four years, the Rules Committee of the Supreme and District Courts should review the discount rate to be used in determining the amount of an award in respect of future pecuniary damages, and the *Courts of Justice Act, 1984* should be amended accordingly so to provide.[79]

3. MANAGEMENT FEES

Damages for future pecuniary loss are quantified on the assumption that the lump sum award will generate a predicted return if prudently invested by an unsophisticated person. In Canada, where an award is substantial,[80] and where there is evidence suggesting that the victim lacks

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[77] Rule 2.03 provides that "[t]he court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time".

[78] *Crew v. Nicholson*, unreported (February 20, 1987, Ont. H.C.J.), at 38-39 (*per* O'Leary J.).

[79] See the draft *Courts of Justice Amendment Act* proposed by the Commission, *infra*, Appendix 2, s. 1(3). A similar recommendation has been made in relation to the assumptions underlying gross-up: see *supra*, ch. 4, sec. 3(d)(ii)g.

[80] See *McLeod v. Palardy* (1981), 10 Man. R. (2d) 181, 124 D.L.R. (3d) 506 (C.A.), and *MacDonald v. Alderson* (1982), 15 Man. R. (2d) 35, [1982] 3 W.W.R. 385 (C.A.). See, also, Cooper-Stephenson and Saunders, *supra*, note 5, at 324.

the capacity to invest the lump sum prudently, the court will sometimes award a management fee, that is, an additional sum of damages to enable the victim to secure professional investment counselling. The management fee, properly allocated, ensures that the victim will make a prudent investment and receive the optimum return. There is, however, no reported case in which damages have been reduced to reflect the victim's expertise as an investor.

In *Arnold v. Teno*,[81] a case involving a mentally incapacitated child and an award in excess of half a million dollars, Spence J. endorsed the management fee awarded by the Court of Appeal. He seemed to indicate that anyone, not just an incapacitated victim, would require assistance in managing such a sum. However, in Ontario,[82] and in most other Canadian jurisdictions,[83] a management fee ordinarily will be awarded only to a plaintiff who has suffered mental incapacity, or who otherwise demonstrates more than a general inability to manage a large award.

The arguments against making an allowance for management fees are twofold. First, there is no guarantee that the fee will be used for the intended purpose. Secondly, the court is effectively discriminating against the more sophisticated investor when it awards management fees to others. Those who manage their own investments must spend time and income managing those investments. If someone chooses or is forced to hire someone else to perform this function, whether to avoid the effort or to generate a higher return, arguably, it should not be a concern of the court.

At the same time, there is an obvious need for some form of investment assistance in the case of a mentally impaired victim; there is no point in awarding damages on an assumption of prudent investment with which the plaintiff cannot possibly comply.

We have concluded that the present practice of declining to award management fees except in cases where the victim is clearly incapable of managing her own fund is satisfactory. There does not appear to be sufficient reason to recommend legislation on this point.

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[81] *Supra*, note 17.

[82] *McErlean v. Sarel*, unreported (September 29, 1987, Ont. C.A.), at 74-75; *Fenn v. City of Peterborough* (1979), 25 O.R. (2d) 399, 104 D.L.R. (3d) 174 (C.A.), aff'd [1981] 2 S.C.R. 613; *De Champlain v. Etobicoke General Hospital* (1985), 34 C.C.L.T. 89 (Ont. H.C.J.); and *Lapensée v. Ottawa Day Nursery* (1986), 35 C.C.L.T. 129 (Ont. H.C.J.).

[83] *Laird v. Costain; Costain v. Mungall's Estate* (1978), 24 N.B.R. (2d) 510, 48 A.P.R. 510 (Q.B.); *Dupuis v. Melanson* (1978), 24 N.B.R. (2d) 312, 48 A.P.R. 312 (Q.B.); *Wilson v. Lackie Bros. Ltd.* (1985), 62 N.B.R. (2d) 236, 161 A.P.R. 236 (Q.B.); *Mandas v. Thomschke* (1983), 44 B.C.L.R. 322, 145 D.L.R. (3d) 530 (S.C.); *Lan v. Wu*, [1979] 2 W.W.R. 122, 14 C.C.L.T. 282 (B.C.C.A.); *Loney v. Voll*, [1974] 3 W.W.R. 193 (Alta. S.C.,T.D.); and *Lamont v. Pederson* (1981), 7 Sask. R. 18, [1981] 2 W.W.R. 24 (C.A.).

RECOMMENDATIONS

The Commission makes the following recommendations:

1. Legislation should not be enacted to prescribe a percentage deduction for contingencies in all cases or to deal with the possibility of discounting doubly for contingencies.

2. There should be no change in the law governing discount rates; however, at least once every four years, the Rules Committee of the Supreme and District Courts should review the discount rate to be used in determining the amount of an award in respect of future pecuniary damages.

3. There should be no change in the current law governing the award of management fees.

CHAPTER 9

EXEMPLARY DAMAGES

1. INTRODUCTION

Unlike all other heads of damage discussed in this Report, exemplary damages are not awarded to compensate the plaintiff for loss suffered as a result of the defendant's conduct.[1] Rather, they are awarded to punish the defendant; to deter similar conduct in the future on the part of the defendant and others; or to express the court's disapproval of the defendant's behaviour.

The ability of the court to award exemplary damages has been the subject of considerable controversy. As we shall discuss below, the arguments presented on both sides of the debate call into question the very nature of the tort liability system itself. Moreover, the approaches to exemplary damages adopted in various jurisdictions have not been consistent. In this chapter, therefore, after discussing the distinction between exemplary damages and aggravated damages, we highlight some of the arguments that have been made, both for and against exemplary damages. Thereafter, we discuss briefly the current law of exemplary damages in Great Britain and Canada. Finally, we draw certain conclusions in respect of the reform of the law of exemplary damages.

2. EXEMPLARY AND AGGRAVATED DAMAGES DISTINGUISHED

Terminology in this area of the law has been the source of some confusion.[2] The expression "aggravated damages" has often been used to designate an award that is not easily distinguished from exemplary damages. In *Rookes v. Barnard*,[3] however, the House of Lords drew a sharp

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[1] Exemplary damages are also often referred to as "punitive damages". As we note *infra*, this ch., sec. 3, it has been argued that exemplary damages may be justified on the basis that they compensate the plaintiff for loss that would otherwise not be compensated.

[2] Some of the terms that have been used, often interchangeably, to describe damages intended to punish the defendant are: "aggravated", "deterrent", "exemplary", "penal", "punitive", "retributory", and "vindictive".

[3] [1964] A.C. 1129, at 1221, [1964] 2 W.L.R. 269 (H.L.) (subsequent references are to [1964] A.C.).

distinction between aggravated damages and exemplary damages, indicating that, while the former were compensatory in nature, the latter were not. Thus, the term "aggravated damages" was said to be applied appropriately only to damages awarded by way of compensation, that is, damages to compensate for the additional injury caused to the plaintiff by the humiliation and distress suffered by reason of the defendant's conduct.

The functional distinction enunciated in *Rookes v. Barnard*[4] between exemplary and aggravated damages has been adopted in Canada, even though the restrictions imposed by the House of Lords in that case, on the availability of exemplary damages, apparently have been rejected. In a recent decision, for example, Robins J.A., speaking for the Ontario Court of Appeal, described the nature of aggravated damages in the following terms:[5]

> Aggravated damages are damages which take into account the additional harm caused to the plaintiff's feelings by such reprehensible or outrageous conduct on the part of the defendant. Their purpose is compensatory and, being compensatory, they properly form part of a general damage award. Aggravated damages, it should be understood, are not punitive—punishment is not the function of a compensatory award. They must be distinguished from 'punitive' or 'exemplary' damages...which are non-compensatory and have as their object punishment and deterrence.

Mr. Justice Robins distinguished exemplary damages from aggravated damages as follows:[6]

> Exemplary damages bear no relation to what the plaintiff ought to receive as compensation. They form a separate and distinct head of damage. Unlike aggravated damages which represent a real loss suffered by the plaintiff and are intended to put him, so far as money can do so, in the position he would have enjoyed but for the extra harm inflicted by the defendant's bad conduct, their function is not compensatory. Exemplary damages have been characterized as '*fictional*, or *judicial* damages, designed to indicate the displeasure of the court, whether judge or jury, at the heinousness of the defendant's conduct'....They are intended to serve the societal purpose of punishing the wrongdoer and deterring him and others from similar conduct in the future. For all practical purposes, they constitute a fine for conduct deemed worthy of punishment and as such provide a windfall for the plaintiff.

Finally, Robins J.A. noted that, although objectionable behaviour on the part of the defendant might give rise to either or both types of damage, exemplary damages and aggravated damages are distinct functionally:[7]

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[4] The restrictions imposed by the House of Lords in this case are discussed *infra*, this ch., sec. 4(a).

[5] *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104, at 111, 39 C.C.L.T. 121 (C.A.) (subsequent references are to 59 O.R. (2d)).

[6] *Ibid.*, at 120.

[7] *Ibid.*, at 119-20.

Misconduct of the type described by such terms as 'insulting', 'high-handed', 'malicious', 'oppressive', 'outrageous', 'reprehensible' or 'in contumelious disregard of the plaintiff's rights' may in the circumstances of any given case give rise to one or the other or both of these forms of damage. But it must be recognized that aggravated and exemplary damages serve fundamentally different functions and fall under separate classifications in a damage assessment.

3. ARGUMENTS FOR AND AGAINST EXEMPLARY DAMAGES

In this section we set out the arguments typically advanced for and against the award of exemplary damages.[8] In view of the conclusions we reach below, we do so briefly and without comment as to their relative merits.

The primary argument in favour of exemplary damages begins with the assertion that, in addition to compensation, both deterrence and punishment are legitimate objectives of tort law. During the course of a civil action conduct might come to the attention of the court that, quite apart from justifying an award of compensatory damages, is itself deserving of punishment and the condemnation of the court. For a variety of reasons, the criminal law might not punish the defendant, or might not punish her adequately, and the power of the civil court to award exemplary damages in these circumstances fills this lacuna in the justice system.

The award of exemplary damages has also been justified, perhaps as a specific instance of the deterrence rationale, as a means of preventing unjust enrichment in cases in which the defendant would otherwise profit from the misconduct.[9] This would address the case, for example, where the defendant would benefit economically from her misconduct, even after compensating the plaintiff for her loss.

A number of subsidiary arguments have also been advanced in favour of exemplary damages. For instance, the availability of exemplary damages has been said to provide a desirable incentive to private prosecution; in the absence of the availability of such damages the plaintiff might not be motivated to bring the action.

Notwithstanding the court's desire to ensure that the plaintiff recovers full compensation, the plaintiff will often suffer uncompensated loss. Moreover, the plaintiff will ordinarily recover only a portion of her legal costs. Exemplary damages, it has thus been argued, enable the court to relieve the innocent plaintiff of these burdens, which, it is pointed out, were imposed upon the plaintiff by the reprehensible conduct of the defendant.

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[8] The arguments are canvassed more fully in Fridman, "Punitive Damages in Tort" (1970), 48 Can. B. Rev. 373, at 399-408. See, also, Waddams, *The Law of Damages* (1983), paras. 980-87, at 563-67.

[9] Indeed, the Commission defended punitive damages on this ground in its *Report on Class Actions* (1982), Vol. II, at 588.

The case against exemplary damages is founded largely upon the assertion that punishment and deterrence are objectives that belong exclusively within the jurisdiction of criminal law. A wrongdoer who has been punished by the criminal law ought not to be subject to additional or double punishment at the instance of a civil court. On the other hand, a wrongdoer who has not been punished by the criminal law might not have been punished for good reason. For example, the objectionable conduct might not have been constituted an offence by appropriate legislation. In these circumstances, it is doubtful whether a civil law court could, or should, in effect, create its own offence or devise its own regulatory standards. If the wrongdoer has been prosecuted and acquitted in a criminal proceeding, it is questionable whether punishment should be imposed nevertheless in a subsequent civil proceeding. Similarly, if the wrongdoer has been prosecuted and either discharged or punished lightly, it seems objectionable for a civil court in effect to review the decision of a criminal court. Finally, if the decision has been taken not to prosecute the wrongdoer criminally, it may be argued that the discretion of the Crown prosecutors ought not to be reviewed by the civil court.

The case against exemplary damages also raises the anomaly that the "fine" imposed upon the wrongdoer goes not into the government treasury, but into the pocket of the plaintiff who, by hypothesis, has suffered no corresponding loss. The arguments against exemplary damages were summarized by Lord Reid in 1972 as follows:[10]

> [T]he plaintiff, by being given more than on any view could be justified as compensation, was being given a pure and undeserved windfall at the expense of the defendant, and...in so far as the defendant was being required to pay more than could possibly be regarded as compensation he was being subjected to pure punishment.
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> I thought and still think that that is highly anomalous. It is confusing the function of the civil law which is to compensate with the function of the criminal law which is to inflict deterrent and punitive penalties.
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> ....
>
> I think that the objections to allowing juries to go beyond compensatory damages are overwhelming. To allow pure punishment in this way contravenes almost every principle which has been evolved for the protection of offenders. There is no definition of the offence except that the conduct punished must be oppressive, high-handed, malicious, wanton or its like—terms far too vague to be admitted to any criminal code worthy of the name. There is no limit to the punishment except that it must not be unreasonable. The punishment is not inflicted by a judge who has experience and at least tries not to be influenced by emotion: it is inflicted by a jury without experience of law or punishment and often swayed by considerations which every judge would put out of his mind. And there is no effective appeal against sentence.

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[10] *Cassell & Co. Ltd. v. Broome*, [1972] A.C. 1027, at 1086-87, [1972] 2 W.L.R. 645 (H.L.).

It has also been argued that the availability of exemplary damages may affect the settlement process. There is some anecdotal evidence that a threat to demand exemplary damages might be sufficient to induce the defendant to settle the claim, and pay a higher amount than the circumstances would otherwise have warranted. In effect, elements of plea bargaining are thus introduced into the civil process, thereby permitting the plaintiff to take personal advantage of what, in some respects, may be seen as equivalent to a threat to prosecute. Further, in cases in which exemplary damages are not covered by liability insurance,[11] the defendant may have a conflict of interest with her insurer. In such cases, separate counsel will often be required, and the cost of settlement will be increased accordingly.

4. CURRENT LAW

(a) GREAT BRITAIN

In *Rookes v. Barnard*,[12] Lord Devlin admitted that exemplary damages represented an anomalous confusion of the functions of civil and criminal law, but, for two reasons, he nevertheless acknowledged a continuing role for such damages. First, he suggested that, simply through the force of precedent, the right to grant exemplary damages could not be eliminated in its entirety.[13] Secondly, Lord Devlin conceded that "there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal".[14]

The categories referred to by Lord Devlin resulted in the restriction of exemplary damages, by the House of Lords, to the following three situations: (1) cases where exemplary damages are authorized specifically by statute; (2) cases where there has been "oppressive, arbitrary or unconstitutional action by the servants of the government"[15] including the police and local authorities; and (3) cases "in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff".[16] Several years later, in *Cassell &*

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[11] There is doubt about whether or not exemplary damages are covered by the ordinary liability insurance policy. Moreover, some insurance policies exclude exemplary damages expressly.

[12] Supra, note 3.

[13] *Ibid.*, at 1225-26.

[14] *Ibid.*, at 1226.

[15] *Ibid.*

[16] *Ibid.*

Co. Ltd. v. Broome,[17] the House of Lords held that *Rookes v. Barnard* was not decided *per incuriam* and, notwithstanding conflicting decisions elsewhere in the Commonwealth, represented the law of England.

(b) Canada

It would seem that the restrictions imposed by the House of Lords on the award of exemplary damages have not been adopted in Canada. The Canadian position is, perhaps, a little uncertain since *Rookes v. Barnard*[18] has never been approved or disapproved explicitly by the Supreme Court of Canada. However, in a judgment given more than ten years after *Rookes v. Barnard*, which did not refer to the House of Lords decision, the Supreme Court of Canada awarded exemplary damages in a case that, arguably, might not have fallen within any of the specified categories.[19] The law in Canada has been summarized, somewhat more recently, in the following terms: "[i]n Canada...the weight of judicial authority is against accepting those limitations on the court's power to award exemplary damages, and at this juncture it can fairly be concluded, as Professor Waddams has, 'that the restrictions laid down in *Rookes v. Barnard* are not part of Canadian law' ".[20]

Assuming that the right to award exemplary damages is not restricted in Canada to the categories laid down in *Rookes v. Barnard*, it is nevertheless confined to behaviour that is "malicious, high-handed, arbitrary, oppressive, deliberate, vicious, brutal, grossly fraudulent, evil, outrageous, callous, disgraceful, willful, wanton, in contumelious disregard of the plaintiff's rights, or in disregard of every principle that actuates the conduct of a gentleman".[21]

In the past, therefore, exemplary damages have been awarded, typically, only in cases of deliberate misconduct.[22] However, in 1981, the British Columbia Court of Appeal held that exemplary damages were available where injury was caused by negligence combined with what the Court found to be high-handed and arrogant conduct.[23] The Court of Appeal said that

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[17] *Supra*, note 10.

[18] *Supra*, note 3.

[19] *H.L. Weiss Forwarding Ltd. v. Omnus*, [1976] 1 S.C.R. 776, 63 D.L.R. (3d) 654. But see Waddams, *supra*, note 8, para. 997, at 571.

[20] *Walker v. CFTO Ltd.*, *supra*, note 5, at 118. For a description of the "cool reception" received by *Rookes v. Barnard* in other Commonwealth jurisdictions see Waddams, *supra*, note 8, para. 996, at 570.

[21] *Ibid.*, para. 998, at 571.

[22] See, for example, *Dandurand v. Pier 1 Imports (Canada) Inc.* (1986), 55 O.R. (2d) 329, 15 O.A.C. 156 (C.A.).

[23] *Robitaille v. Vancouver Hockey Club Ltd.* (1981), 30 B.C.L.R. 286, 124 D.L.R. (3d) 228 (C.A.) (subsequent reference is to 30 B.C.L.R.).

the trial judge was justified in awarding exemplary damages "because, on the facts, the conduct of the defendants was such as to merit condemnation and, in addition, caused damage to the plaintiff".[24] More recently, Mr. Justice Cohen, of the British Columbia Supreme Court, awarded $25,000 exemplary damages in a medical malpractice case.[25] While he acknowledged that an award of exemplary damages was rare in such cases,[26] he concluded that "the defendant exhibited behaviour towards his profession and the plaintiff that can only be described as reprehensible".[27] The defendant's conduct, Mr. Justice Cohen said, "demonstrated not only a lack of care amounting to negligence but a wanton disregard for the safety and health of the plaintiff".[28]

5. CONCLUSIONS

We have referred above to the controversy surrounding exemplary damages. Not only have Commonwealth jurisdictions differed as to the availability of such damages, but the theoretical basis of exemplary damages has been the subject of serious debate. Moreover, a variety of statutory provisions have been proposed or enacted in the United States to address a current perceived crisis concerning exemplary damages in that jurisdiction. These statutory provisions include the following: an increase in the standard of proof required to establish entitlement to exemplary damages;[29] a prohibition against exemplary damages, either with respect to certain causes of action, or more generally;[30] the imposition of a limit on the quantum of such damages, the limit being either absolute or relative to the amount of

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[24] *Ibid.*, at 311.

[25] *Coughlin v. Kuntz* (1987), 17 B.C.L.R. (2d) 365 (S.C.).

[26] *Ibid.*, at 46.

[27] *Ibid.*, at 45.

[28] *Ibid.*, at 46.

[29] For example, in Iowa, § 1a(4) of Senate File 248, filed February 25, 1987, would require the plaintiff to prove the defendant's culpability and all elements authorizing the imposition of punitive damages beyond a reasonable doubt. In Maine, House Paper 204, introduced February 5, 1987, would require that, before imposing punitive damages, there must be a finding of actual malice or actual fraud by clear and convincing evidence.

[30] For example, in Tennessee, § 6 of Senate Bill 913, filed on February 18, 1987, would abolish the right of an injured party to recover punitive or exemplary damages. In Wyoming, House Bill No. 0168, 1987, would have prohibited an award of punitive damages being made against any governmental entity. In Louisiana the general rule is that, absent specific statutory authorization, punitive damages may not be awarded: see Redden, *Punitive Damages* (1980), § 5.2(A)(18), at 280. A similar general prohibition, in the absence of specific legislation, applies in Massachusetts, Nebraska and Washington: see Redden, *ibid.*, § 5.2(A)(21), (27), and (47), at 313, 379, and 489.

compensatory damages otherwise awarded;[31] and a requirement that all or a stated portion of such damages be paid into the state general fund, or some other specified fund.[32]

In light of this controversy, we have concluded that it would be inappropriate, within the specific context of this Report, to consider the case for and against reform of the law of exemplary damages. Although exemplary damages have been identified as a contributing factor to the recent "insurance crisis" in the United States, there is no evidence that such damages, which have been awarded only rarely in this jurisdiction, have had similar consequences in Ontario. Accordingly, even if it is determined that reform of the law of exemplary damages generally is desirable, there appears to us to be no urgent need to resolve the issue in the context of this Report.

The main thrust, running throughout this Report, is the desire to ensure that the injured plaintiff receives full compensation for all losses actually suffered as a result of the defendant's misconduct, no more and no less. While this might argue against the retention of exemplary damages, on the ground that they constitute a windfall to the plaintiff, we believe that the question whether, and to what extent, exemplary damages serve a rational purpose other than compensation ought not to be determined within the scope of this Report. Moreover, in this Report, compensation has been considered only as it relates to cases involving personal injury and death. Exemplary damages, of course, are not so restricted. Indeed, they have been awarded "for most non-contractual wrongs, including defamation, assault, false imprisonment, trespass, nuisance, interference with contract, slander of title, conversion and wrongful seizure of goods, breach of copyright, conspiracy, abuse of legal process and wrongful denial of a building permit".[33] Clearly, therefore, a review of exemplary damages, limited to the present context of personal injury and death, would be unduly and artificially restricted. In the result, we have concluded that no recommendation ought to be made with respect to exemplary damages in this Report, and that a separate project on exemplary damages might usefully be undertaken by the Commission.

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[31] For example, in Alabama, in the case of civil actions for wrongful death, § 5B of Act No. 87-189, restricts the amount of recovery for non-economic losses, including punitive damages, to the sum of $400,000. In the case of other civil actions, § 2 of Act No. 87-185 provides that an award of punitive damages shall not exceed $250,000 unless certain conditions are fulfilled. In California, Assembly Bill No. 1522, introduced March 4, 1987, would limit punitive damages to twice economic damages. In Colorado, House Bill No. 1197 (enacted May 16, 1986) limits the amount of punitive damages to the amount of actual damages awarded. In Indiana, § 7 of House Bill 1332, introduced in the 1987 legislative session, would limit the amount of punitive damages to the greater of $100,000 and three times the amount of actual damages.

[32] For example, in California, Assembly Bill No. 363, introduced January 22, 1987, would require 75% of exemplary damages awarded in excess of $5,000 to be paid into the Consumer Protection and Education Fund, established under the Bill. In Colorado, House Bill No. 1197, *supra*, note 31, requires that one third of punitive damages be paid into the state general fund.

[33] Waddams, *supra*, note 8, para. 1000, at 573-74.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

*CHAPTER 2: LOSS OF WORKING CAPACITY

1. (1) Third party claims under Part V of the *Family Law Act, 1986* for pecuniary losses and for loss of guidance, care and companionship resulting from wrongful injury to or death of another person should be abolished and replaced by a first party claim for loss of "working capacity", as defined in Recommendation 3, *infra*.

   (2) Accordingly, section 61(1) and section 61(2)(e) of the *Family Law Act, 1986* should be repealed. (See, further, Recommendation 33, concerning repeal of the remainder of section 61.)

2. Legislation should provide clearly that a claim for loss of working capacity survives to the estate of a deceased tort victim.

3. Loss of working capacity should be defined to mean loss of productive capacity including,

   (a) loss of the capacity to earn;

   (b) loss of the capacity to provide care and guidance to a spouse, dependent children or dependent parents of the injured or deceased person as defined in Recommendation 4, *infra*;

   (c) loss of the capacity to provide household services; and

   (d) loss of entitlement under a pension, annuity or similar instrument.

4. For the purposes of Recommendation 3(b), *supra*,

   (a) "spouse" should be defined to mean a spouse within the meaning of Part III of the *Family Law Act, 1986*;

   (b) "dependent child" should be defined to mean a child who is a minor, or a child who is not a minor but who has, or who immediately before the death had, a reasonable expectation of

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* One of the Commissioners, Mrs. Margaret A. Ross, dissents from most aspects of the scheme embodied in the recommendations made in ch. 2: see *supra*, ch. 2, sec. 10.

receiving substantial pecuniary benefit from the injured or deceased tort victim; and

(c) "dependent parent" should be defined to mean a parent who has, or who immediately before the death had, a reasonable expectation of receiving substantial pecuniary benefit from the injured or deceased tort victim.

5. For the purposes of Recommendation 3(c), *supra*, compensation for loss of capacity to perform household services should be assessed with reference to the average weekly earnings in Ontario (industrial aggregate).

6. In cases of non-fatal injury, the existing rule, that income tax should not be deducted from the award, should continue to govern the determination of damages for loss of working capacity.

7. Where personal injury results in death, no deduction should be made from an award of damages for loss of working capacity in respect of the income tax that would have been payable by the deceased.

8. Where personal injury results in death, the award of damages for loss of working capacity, other than damages for loss of capacity to give care and guidance, should be reduced by the cost of earning that would have been incurred by the deceased but for the personal injury.

9. (1) Where personal injury results in death, the award of damages for loss of working capacity, other than damages for loss of capacity to give care and guidance, should be reduced by the amount of the deceased's personal living expenses as determined under paragraph (2).

(2) The personal living expenses that are to be deducted from the damages award should be conclusively presumed to be three-quarters of the projected income of a person who dies without a spouse or dependent children; one-quarter of the projected income of a person who dies with a spouse but without any dependent children, during the anticipated joint life expectancy of the deceased and his spouse; and fifteen percent of the projected income of a person, with or without a spouse, who dies with dependent children, during the projected period of dependency.

10. Where there is no surviving spouse, dependent children or dependent parents, the damages in respect of loss of working capacity should be payable to the estate, and should be distributed like any other asset of the estate under the general law governing succession, and subject to the claims of creditors.

11. Where damages are assessed in respect of the loss of capacity to give care and guidance, the damages should be distributed among the

surviving spouse, dependent children, and dependent parents in the amounts assessed in respect of each of them.

12. Damages awarded for loss of working capacity, other than the damages awarded for loss of capacity to give care and guidance, should be apportioned among the surviving spouse, dependent children and dependent parents. The matter of apportionment should be decided by the court.

13. In determining apportionment of the damages awarded for loss of working capacity, other than for loss of capacity to give care and guidance, the court should be able to order the trial of an issue and to give such directions for that purpose as are considered just.

14. Legislation should provide that the surviving spouse, dependent children and dependent parents may intervene in respect of the issue of apportionment as parties to the action under the Rules of Civil Procedure.

15. Where one or more of the surviving spouse, dependent children, and dependent parents is a person under a disability, the court should be able to order that notice be given to the Official Guardian or the Public Trustee or any other person that the court considers appropriate.

16. Where damages for loss of working capacity, including loss of the capacity to give care and guidance, are distributed by the court among the surviving spouse, dependent children, and dependent parents, the damages should not be subject to the claims of creditors of the deceased person or to the costs arising from the administration of the estate.

17. (1) Subject to paragraph (2), an action for damages in respect of loss of working capacity should be brought by the personal representative on behalf of the estate.

    (2) A surviving spouse, dependent child or dependent parent should be able to bring the action that the personal representative could have brought where an action has not been brought by the personal representative within six months of the death, or sooner with leave of the court.

18. The surviving spouse, dependent children, and dependent parents should have a right of appeal from an order distributing or apportioning damages for loss of working capacity, regardless of whether they are parties or intervenors in the action.

19. (1) Legislation should provide that, where personal injury results in death, a settlement of a claim in respect of loss of working capacity requires the consent of the surviving spouse, dependent children and dependent parents whose existence is reasonably within the knowledge of the person making the claim.

(2) Legislation should provide that an application or motion may be made to the court to determine whether any person is a spouse, dependent child or dependent parent whose consent is required under paragraph (1).

(3) Where one or more of the surviving spouse, dependent children, and dependent parents is a person under a disability, the provisions of the Rules of Civil Procedure governing settlement of a claim made by or against a person under a disability should apply with necessary modification.

20. Costs incurred by the plaintiff in an action for damages for loss of working capacity that are not recovered from the defendant or another party should be paid out of the damages on a *pro rata* basis before they are distributed.

21. The action *per quod servitium amisit* should be abolished.

CHAPTER 3: DAMAGES FOR NON-PECUNIARY LOSS

*22. There should be no change in the present law and practice, as enunciated by the Supreme Court of Canada in the trilogy, respecting awards of damages for non-pecuniary loss.

23. (1) In the trial of an action for damages for personal injuries, the judge should be empowered to give guidance to the jury concerning the quantum of damages for non-pecuniary loss.

(2) Counsel should have the right to make submissions to the judge or the jury, as the case may be, on the quantum of damages, subject to the trial judge's overriding discretion to control proceedings of the court.

(3) An appellate court should have power, when setting aside a jury or court assessment of damages for non-pecuniary loss, to substitute its own assessment, instead of ordering a new trial, if it thinks this to be just in the circumstances.

24. There should be no change in the law, under section 38(1) of the *Trustee Act*, respecting the entitlement of the estate of an injured person to recover damages for non-pecuniary loss.

25. The law respecting the award of damages for emotional distress, standing alone, should be allowed to develop on a case-by-case basis, without legislative intervention.

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* Dr. H. Allan Leal, O.C., Q.C., Vice Chairman of the Commission, dissents from this recommendation: see *supra*, ch. 3, note 148.

CHAPTER 4: COST OF CARE

26. There should be no change in the present law respecting the general test of "reasonableness" to determine the standard of care to be awarded to a successful plaintiff in a personal injury action.

27. (1) The Government of Canada should be urged, by strong representations at the highest level, to introduce a tax sheltered plan, analogous to a registered retirement savings plan, that would permit investment in the plan of the entire amount of compensation awarded for future care.

    (2) Investment income should be permitted to accumulate in the plan, free of tax.

    (3) The plaintiff should be taxed on withdrawals from the plan, subject to the ordinary rules, including the medical expense deduction, only until the amount remaining in the plan equals the amount originally paid in, which amount the plaintiff should then be able to withdraw free of tax.

28. Legislation should be enacted, at the earliest opportunity, to provide that an award of damages for future care shall include an amount that would offset liability for income tax on income from investment of the award.

29. The *Courts of Justice Act, 1984* should be amended to provide that the Rules Committee of the Supreme and District Courts may make rules in relation to the method of calculating the amount to be included in an award of damages for future care that would offset liability for income tax on income from investment of the award.

30. For the purpose of calculating the amount to be included in an award of damages for future care under Recommendation 28, the following assumptions should be standardized and implemented by amendment to the Rules of Civil Procedure:

    (a) the rate of inflation should be assumed to be the average of the annual rates of change in the Consumer Price Index (all items, Canada) for the five year period ending in October of the year prior to the year in which judgment is given, adjusted to the nearest one-half percentage point.

    (b) the income tax laws should be assumed to be the income tax laws enacted or made at the time of trial, including any future changes in the income tax laws, enacted or made at the time of trial, but not applicable until a subsequent tax year; however, all fixed dollar amounts in the income tax laws should be assumed to increase annually at the assumed rate of inflation.

(c) the funds from an award for future care should be assumed to be invested fifty percent in equities and fifty percent in interest-bearing investments.

(d) after taking inflation into account, the annual rate of return, in respect of both equities and interest-bearing investments, should be assumed to be the rate specified in the Rules of Civil Procedure, from time to time, in respect of the discount rate, which, at present, would be 2.5 percent.

(e) the total annual return on equity investments, as determined under paragraphs (a) and (d), should be assumed to be composed of the following:

(i) dividends, at the annual rate of 3.5 percent of capital; and

(ii) capital gains, as to the remainder, realized annually.

(f) the amount that the injured person should be assumed to withdraw from the fund for future care in each year should be the expected cost of future care for that year, taking into account the probability of surviving to that year and all contingencies used in the calculation of the present value of the costs of future care.

(g) the plaintiff's future income earned after the accident, and the plaintiff's investment income derived from the award for loss of working capacity should be taken into account, but the plaintiff's income from other sources should be ignored.

31. The *Courts of Justice Act, 1984* should be amended to provide that the rules made in relation to the method of calculating the amount to be included in an award of damages for future care that would offset liability for income tax on income from investment of the award shall be reviewed at least once every four years.

32. Legislation should not be enacted to deal with the possibility, in the assessment of damages in a personal injury action, of duplication in respect of the award for basic necessities of life.

33. The present uncertainty surrounding the relationship between third party claims under the *Family Law Act, 1986* and the injured person's own claim should be resolved by repealing section 61(2)(a), (b), (c), and (d) of the *Family Law Act, 1986*, while providing that the injured person has the right to compensation in such cases, and that the court may order that the compensation be held in trust for the third party.

CHAPTER 5: REVIEWABLE PERIODIC PAYMENTS

*34. The law in Ontario should not be changed to accommodate a system of periodic payments, whether reviewable or non-reviewable, that could be ordered by the court without the consent of the parties.

CHAPTER 6: COLLATERAL BENEFITS

35. Where an injured person has received an indemnity, including an *ex gratia* payment, in respect of any specific pecuniary loss claimed from a wrongdoer, the damages in respect of that loss should be held in trust for the collateral source.

36. (1) The wrongdoer, or her insurer, should be entitled to make payment of such damages directly to the collateral source, and should be entitled to receive a discharge of liability to the extent of such payment.

(2) Payment of damages to the collateral source should include prejudgment interest.

37. Recommendations 35 and 36 should not apply until the injured person has been fully indemnified for her entire loss from any source or combination of sources.

CHAPTER 7: PREJUDGMENT INTEREST

38. Section 138(1) of the *Courts of Justice Act, 1984* should be amended to provide that prejudgment interest should run from the date upon which the cause of action arises.

39. Prejudgment interest rates should be set quarterly.

40. The rate of prejudgment interest should be equal to the average bank rate for each quarter, rounded to the nearest one-tenth of a percentage point.

41. Prejudgment interest should be compounded, with quarterly calculations.

**42. Prejudgment interest should be awarded on damages for non-pecuniary loss at the rate specified in the Rules of Civil Procedure, from time

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* Dr. H. Allan Leal, O.C., Q.C., Vice Chairman of the Commission, dissents from this recommendation: see *supra*, ch. 5, sec. 5.

** One of the Commissioners, Mr. Earl A. Cherniak, Q.C., dissents from this recommendation: see *supra*, ch. 7, sec. 5.

to time, in respect of the discount rate, which, at present, would be 2.5 percent.

43. Section 138(2) of the *Courts of Justice Act, 1984* should be amended by replacing the term "special damages" with the term "past pecuniary loss".

CHAPTER 8: MISCELLANEOUS ISSUES

44. Legislation should not be enacted to prescribe a percentage deduction for contingencies in all cases or to deal with the possibility of discounting doubly for contingencies.

45. There should be no change in the law governing discount rates; however, at least once every four years, the Rules Committee of the Supreme and District Courts should review the discount rate to be used in determining the amount of an award in respect of future pecuniary damages.

46. There should be no change in the current law governing the award of management fees.

CONCLUSION

In this Project, the Commission has attempted to examine the utility of existing legal principles governing the assessment of compensation for personal injury and death. While public concern with this subject has been exacerbated in recent years by a perceived "crisis" respecting the availability and cost of liability insurance, it must be emphasized that this concern is, in fact, of very long standing and that the issues that arise are broader and more fundamental than those pertaining exclusively to insurance.

In our terms of reference, the Commission has excluded consideration of radical reform measures, such as replacing the existing tort regime with a system of first party liability insurance. Rather, our focus has been on the difficult and recurring assessment problems that, today, press for resolution under the present fault-based tort system. The Commission has offered proposals for reform designed to ensure that, so long as this system is retained, the principles governing the assessment of compensation under it are fair, reasonable, and consistent, having regard to the interests of all parties.

In our study, we have been ably assisted by a great many persons, whose contributions have been acknowledged in the Foreword to this Report. The Commission wishes, once again, to record our gratitude to those who devoted their time, energy, and expertise to the Project, and, particularly, to our Project Director, Professor Stephen M. Waddams, of the Faculty of Law, University of Toronto.

All of which is respectfully submitted,

J. R. Breithaupt
Chairman

H. Allan Leal
Vice Chairman

E. A. Cherniak
Commissioner

J. R. S. Prichard
Commissioner

M. A. Ross
Commissioner

November 10, 1987

APPENDIX 1

Draft Bill

Bill 00 **198____**

An Act to revise the Law respecting Compensation for personal Injuries and wrongful Death

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. In this Act, Interpretation

"child" includes a person who is a child of a parent as defined in this section;

"dependent child" means a child of a parent who is an injured person, where the child is a minor, or where the child is not a minor, who has a reasonable expectation of receiving substantial pecuniary benefit from the injured person or, where the injured person dies as a result of the personal injury, had such expectation immediately before the death;

"dependent parent" means the parent of a child who is an injured person where the parent has a reasonable expectation of receiving substantial pecuniary benefit from the injured person or, where the injured person dies as a result of the personal injury, had such expectation immediately before the death;

"injured person" means a person who has a right of action in damages for a personal injury, notwithstanding that the injury results in death;

"parent" includes a person who has demonstrated a settled intention to treat a child as a child of his or her family, except an intention under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody;

1986, c. 4

"spouse" means spouse as defined under Part III of the *Family Law Act, 1986*.

Actio per quod servitium amisit abolished

2. The right of action by an employer for the loss of services arising from the personal injury of his or her employee is abolished.

Action for damages for personal injury

3.—(1) The right of action for damages for personal injury referred to in this Act survives the death of the injured person.

Idem

(2) Subject to section 13, an action for damages for personal injury shall be maintained only by the person suffering the personal injury or, where such person is deceased, his or her personal representative.

Extended grounds

4.—(1) In addition to damages otherwise recoverable in law, an action for damages for personal injury may include,

(a) damages for loss of working capacity, notwithstanding that the personal injury results in death;

(b) actual expenses reasonably incurred by another person for the benefit of the injured person and arising out of the injury;

(c) a reasonable allowance for travel expenses actually incurred by another person in visiting the injured person during his or her treatment or recovery;

(d) a reasonable allowance for the value of nursing, housekeeping or other services provided by another person as a result of the injury; and

(e) where the injury results in death, actual funeral expenses reasonably incurred.

Beneficiaries of awards

(2) The court may, if it considers it just to do so, order that any amount recovered under clause (1)(b), (c), (d) or (e) be received in trust upon such terms and for the benefit of such persons as are provided in the order.

Loss of working capacity

5.—(1) Damages for loss of working capacity arising from personal injury are compensation for the loss of productive capacity, including loss of capacity to earn.

Idem

(2) Without limiting the generality of subsection (1), damages for loss of working capacity arising from personal injury may include,

(a) compensation for loss of capacity to give care and guidance to a spouse, dependent children and dependent parents of the injured person;

(b) compensation for loss of capacity to perform household services, assessed with reference to the average weekly earnings in Ontario (industrial aggregate); and

(c) compensation for loss of entitlement of the injured person under a pension plan, annuity or similar instrument.

Calculation of damages for loss of earning capacity

6.—(1) Where personal injury results in death, the damages for loss of working capacity other than loss of capacity to give care and guidance shall be reduced by the amount of personal living expenses as determined under subsection (2), and the cost of earning that would have been incurred if the death had not resulted from the personal injury.

Idem

(2) For the purposes of subsection (1), the personal living expenses shall be conclusively presumed to be,

(a) when the deceased dies without a spouse or dependent child, 75 per cent of the projected income;

(b) when the deceased dies having a spouse and no dependent children, 25 per cent of the projected income during the projected joint life expectancy of the deceased and his or her spouse; and

(c) when the deceased dies having one or more dependent children, 15 per cent of the projected income during the projected period of dependency.

Gross-up of damages for future care

7. An award of damages for future care shall include an amount that would offset liability for income tax on income from investment of the award.

Settlement

8.—(1) Where personal injury results in death, a settlement of a claim for loss of working capacity requires the consent of the surviving spouse, dependent children and dependent parents whose existence is reasonably within the knowledge of the person making the claim.

Application to court for directions

(2) An appliction or motion may be made to the court to determine whether any person is a spouse, dependent child or dependent parent whose consent is required under subsection (1).

Person under disability

(3) For the purposes of subsection (1), the Rules of Civil Procedure governing settlement of a claim made by or against a person under a disability apply with necessary modification in respect of a person mentioned in subsection (1) who is under a disability.

Disposition of damages re working capacity where death

9. Where personal injury results in death, damages in respect of loss of working capacity form part of the estate of the deceased person and,

(a) where there is a surviving spouse, dependent child or dependent parent, are subject to distribution under sections 10 and 11 and are not subject to claims of creditors of the deceased person or costs arising from the administration of the estate;

(b) where there is no surviving spouse, dependent child or dependent parent, are an asset of the estate for payment of debts and distribution as part of the estate.

Distribution of damages re care and guidance

10. Where personal injury results in death, damages awarded for loss of capacity to give care and guidance shall be distributed to the surviving spouse, dependent children and dependent parents of the deceased in the amounts assessed in respect of each of them.

Apportionment of damages for loss of working capacity

11.—(1) Where personal injury results in death, damages awarded for loss of working capacity other than loss of capacity to give care and guidance shall be apportioned among the spouse, dependent children and dependent parents of the deceased in such proportions as the court may order.

Notice

(2) Where a person who is entitled to apportionment is under a disability, the court may require notice to be given to the Public Trustee, Official Guardian or any other person that the court considers appropriate.

Intervention

(3) The spouse, dependent children and dependent parents may intervene under Rule 13 of the Rules of Civil Procedure in respect of their apportionment.

Trial of an issue

(4) The Court may order the trial of an issue in respect of the apportionment of damages under subsection (1), and may give such directions for the purpose as are considered just.

Costs

12. Costs that are incurred by the plaintiff in an action in which damages for loss of working capacity are awarded

and that are not recoverd from the defendant or another party, shall be paid out of the damages pro rata before they are distributed.

Action by dependents

13. Where the personal representative of the deceased person does not commence an action for loss of working capacity within six months of the death, a spouse, dependent child or dependent parent may bring the action that the personal representative could have brought, or may bring the action sooner with leave of the court.

Indemnities

14.—(1) Where a person suffering personal injury has been indemnified in respect of any specific pecuniary loss claimed in an action for the personal injury, whether by gift or otherwise,

(a) the person liable may pay the amount of the damage recoverable in respect of that loss directly to the indemnitor and receive a discharge, to that extent, of liability to the injured person; and

(b) any amount received from the person liable by the person injured in respect of the part of the damages for which he or she is indemnified shall be held in trust for the indemnitor.

Idem

(2) Subsection (1) does not apply unless the injured person has received full indemnity for the entire loss from any source or combination of sources.

Guidance and submissions to the jury on amount of damages

15. In an action for damages for personal injury, the court may give guidance to the jury on the amount of damages, and the parties may make submissions to the jury on the question of the amount of damages.

Power of court on appeal

16.—(1) On an appeal from an award for damages for personal injury, the court may, if it considers it just, substitute its own assessment of the damages notwithstanding that the appeal is from a jury verdict.

Appeal of distribution or apportionment

(2) Any person who is entitled to distribution or apportionment of damages under section 10 or 11 may appeal the order for distribution or apportionment notwithstanding that he or she is not a party or intervenor in the action.

17. Part V of the *Family Law Act, 1986*, being chapter 4, is repealed.

18. Subsection 38(1) of the *Trustee Act*, being chapter 512 of the Revised Statutes of Ontario, 1980, is amended by

striking out "for the loss of the expectation of life, but this proviso is not in derogation of any rights conferred by Part V of the *Family Law Reform Act*" in the ninth, tenth and eleventh lines and inserting in lieu thereof "except as specifically provided by statute, or for the loss of expectation of life".

Act binds Crown

19. This Act binds the Crown.

Application of Act

20.—(1) This Act, except section 7, applies to personal injuries occurring after this Act comes into force.

Idem

(2) Section 7 applies to actions for personal injury commenced after this Act comes into force.

Commencement

21. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

Short title

22. The short title of this Act is the *Personal Injuries Compensation Act, 19* .

APPENDIX 2

Draft Bill

Bill 00 **198____**

An Act to amend the
Courts of Justice Act, 1984

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1.—(1) Subsection 90(1) of the *Courts of Justice Act, 1984*, being chapter 11, is amended by adding thereto the following clause:

(qa) the method of calculating the amount to be included in an award for damages for future care that would offset liability for income tax on income from investment of the award;

(2) Section 90 of the said Act is amended by adding thereto the following subsection:

(3) Rules made under clauses (1)(q) and (qa) shall be reviewed at least once every four years.

Review of rules under clauses 1(q) and (qa)

2. Clause 137(1)(d) of the said Act is repealed and the following substituted therefor:

(d) "prejudgment interest rate" means the average bank rate during each calendar quarter rounded to the nearest one-tenth of a percentage point.

3. Subsections 138(1) and (2) of the said Act are repealed and the following substituted therefor:

(1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon, compounded quarterly, at the prejudgment interest rate prevailing in each calendar quarter during which the interest is payable, calculated from the date the cause of action arose to the date of the order.

Prejudgment interest

Exception for non-pecuniary loss on personal injury

(1a) Notwithstanding subsection (1), the rate of interest on damages for non-pecuniary loss in an action for personal injury shall be assumed to be the rate specified in rule 53.09.

Calculation for past pecuniary loss

(2) Where the order includes an amount for past pecuniary loss, the interest calculated under subsection (1) shall be calculated on the balance of past pecuniary loss incurred as totalled at the end of each six-month period following the date the cause of action arose and at the date of the order.

4. Clause 138(3)(b) of the said Act is repealed.

Application of Act

5. Sections 2, 3 and 4 apply in respect of interest on amounts awarded in actions that are commenced after this Act comes into force.

Commencement

6. This Act comes into force on the day it receives Royal Assent.

Short title

7. The short title of this Act is the *Courts of Justice Amendment Act, 19*

APPENDIX 3

Draft Rule for Inclusion in the Rules of Civil Procedure

Rule 00

For the purpose of calculating the amount to be included in an award of damages for future care that would offset liability for income tax on income from investment of the award,

(a) the income tax law shall be assumed to be the law existing at the time of trial, whether applicable in the current tax year or not, and fixed dollar amounts in the income tax law shall be assumed to increase annually at the rate of inflation determined under clause (b);

(b) the rate of inflation shall be determined as the average of the annual rates of change in the Consumer Price Index for the five-year period ending in October of the year prior to the year in which the judgment is given, adjusted to the nearest one-half percentage point;

(c) the rate of return on equity investments and interest-bearing investments, after taking inflation into account, shall be assumed to be the rate specified in rule 53.09;

(d) the total annual return on equity investments shall be assumed to be composed of,

(i) dividends at the annual rate of 3.5 per cent of capital; and

(ii) capital gains as to the remainder, realized annually.

(e) 50 per cent of the award shall be assumed to be invested in equity investments and 50 per cent shall be assumed to be invested in interest-bearing investments;

(f) the amount that the injured person is assumed to withdraw from the fund for future care in each

year shall be the expected cost of future care in that year multiplied by the factors in that year for the probability of survival and the factors for other contingencies that were used in the calculation of the value of the fund;

(g) anticipated income of the injured person from a source other than the award for future care shall not be taken into account, other than,

(i) investment income from an award for loss of working capacity, and

(ii) anticipated future earnings from work.

SAMPLE AWARDS UNDER PROPOSED GROSS-UP RULES

	Annual Future Care Costs					
Age	*Deductible*	*Not Deductible*	*Lost Earnings*	*Award For Future Care*	*Gross-Up*	*Gross-Up (%)*
30	7,500	2,500	0	255,947	0	0
30	7,500	2,500	22,407	255,947	19,000	7
30	7,500	2,500	50,000	255,947	66,000	26
30	30,000	10,000	0	1,023,788	3,000	0
30	30,000	10,000	22,407	1,023,788	127,000	12
30	60,000	20,000	0	2,047,577	131,000	6
30	60,000	20,000	22,407	2,047,577	362,000	18
30	60,000	20,000	50,000	2,047,577	486,000	24
50	30,000	10,000	0	710,822	0	0
50	30,000	10,000	22,407	710,822	0	0
50	30,000	10,000	50,000	710,822	0	0
5	30,000	10,000	22,407	1,270,217	225,000	18
30	20,000	20,000	22,407	1,023,788	270,000	26
30	30,000	10,000	22,407	1,023,788	509,000	50*

* 9 percent inflation

Calculations are based upon the income tax laws in effect for the 1986 taxation year.

APPENDIX 5

REPORT OF THE COMMITTEE ON TORT COMPENSATION

(Special Committee of Bench and Bar chaired by R.E. Holland J., 1980)

ORIGIN OF COMMITTEE AND SCOPE OF ITS ENQUIRY

For many years, academic writers have proposed a system of periodic payments for future losses in cases of wrongful death and serious personal injury.[1] More recently Mr. Justice Dickson, of the Supreme Court of Canada, has made the same proposal, inside[2] and outside[3] the courtroom. It was in response to these proposals that the Chief Justice of Ontario arranged for the Committee of The Bench and Bar to appoint a special committee to examine the question.

The Committee's terms of reference, though not spelled out in writing, were deduced from the circumstances of its appointment. The Committee considered its task to be the examination of the desirability and feasibility of instituting a scheme in Ontario for the periodic payment of judgments and for the variation of judgments. The Committee appointed Professor S.M. Waddams of the University of Toronto as research director and is grateful for his considerable assistance in the preparation of this report.

One question that the Committee excluded from its terms of reference was that of interim payments before judgment. The Advocates' Society, in its submission to us, drew attention to section 223 of *The Insurance Act*[4] enabling prejudgment payments to be made by an insurer in motor vehicle cases without prejudice to its defence of an action. The Advocates' Society suggested that this section be moved to *The Judicature Act*[5] so that it could be made applicable to all defendants, whether insured or not and to all types

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[1] Fleming, "Damages: Capital or Rent?" (1969), 19 U. Toronto L.J. 295; Fleming, *The Law of Torts* (5th ed., 1977), 214-15.

[2] *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, at 236.

[3] Goodman Lecture, University of Toronto (1979), 14 Law Society of Upper Canada Gazette 138, at 149-50.

[4] R.S.O. 1970, c. 224.

[5] R.S.O. 1970, c. 228.

of cases. This proposal seems meritorious to us, and we recommend that consideration should be given to implementing it by the Rules Committee and the Council of Judges. The possibility of interim payments ordered by the Court should also be considered, together with alternatives such as imposing an interest or cost penalty on a defendant who refuses unreasonably to make interim payments.

DESCRIPTION OF COMMITTEE'S PROCEEDINGS

The Committee met several times, between January and July, 1980. We advertised in the legal and in the daily press inviting briefs, and we sent letters to all insurers carrying on business in Ontario, to large organizations that might be expected to be self-insurers, to Law Reform Commissions and Provincial Justice Departments across Canada, and to Canadian and selected American torts teachers. Memoranda were prepared on the law and practice relating to periodic payments in various Commonwealth and foreign jurisdictions, including the United Kingdom, South Australia, Western Australia, France, West Germany and the American States. Extracts from academic writings on the subject were also made available to us and considered. The Report of the Pearson Commission,[6] and the arguments set out in it for and against periodic payments, were carefully considered.

The response to our advertisements and letters was fairly low, as perhaps was to be expected. Many of the insurers replied, quite understandably, that they were leaving the Insurance Bureau of Canada to speak for them. To those who did reply, it was plain that the possibility of "open-ended" liability was of major concern. The Insurance Bureau of Canada, after consideration, informed us that it could not make submissions on so complex a matter without very careful consideration and extensive study, which seemed impossible within the time schedule contemplated by the Committee. This was a quite reasonable attitude for the Bureau to take, but the result was that we had to proceed without any substantial comment from the persons most likely to be affected by the introduction of a scheme of periodic payments. The response that we did receive, however, was sufficient to indicate to us that any system of variable "open-ended" payments would be viewed by insurers with grave concern.

ARGUMENTS FOR AND AGAINST PERIODIC PAYMENTS

An attempt is made in this section of the report to summarize the chief points for and against introducing a system of periodic payments. As a starting point, it seems sensible to take the words of Dickson J., in *Andrews v. Grand & Toy Alberta Limited*[7] which may be said indirectly to have led to the establishment of this Committee.

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[6] Royal Commission on Civil Liability and Compensation for Personal Injury, Cmnd. 7054-1 (1978).

[7] [1978] 2 S.C.R. 229, at 236-37.

Dickson J. said:

> The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault, must be disturbing. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once-and-for-all award.
>
> The lump sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgment, new needs for the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care and a long term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of continuing needs of the injured person, and the cost of meeting those needs. In making this comment I am not unaware of the negative recommendation of the British Law Commission, (Law Com. 56—Report on Personal Injury Litigation—Assessment of Damages) following strong opposition from insurance interest and the plaintiffs' bar.
>
> The apparent reliability of assessments provided by modern actuarial practice is largely illusionary, for actuarial science deals with probabilities, not actualities. This is in no way to denegrate a respected profession, but it is obvious that the validity of the answers given by the actuarial witness, as with a computer, depends upon the soundness of the postulates from which he proceeds. Although a useful aid, and a sharper tool than the "multiplier - multiplicand" approach favoured in some jurisdictions, actuarial evidence speaks in terms of group experience. It cannot, and does not purport to, speak as to the individual sufferer. So long as we are tied to lump sum awards, however, we are tied also to actuarial calculation as the best available means of determining amount.
>
> In spite of these severe difficulties with the present law of personal injury compensation, the positive administrative machinery required for a system of reviewable periodic payments, and the need to hear all interested parties in order to fashion a more enlightened system, both dictate that the appropriate body to act must be the Legislature rather than the Courts.

ARGUMENTS FOR A PERIODIC PAYMENT SYSTEM

1. Reliability of Assessment

This is probably the strongest argument in favour of a change from the present system. The point seems to have weighed heavily with Dickson J., as he said: "After judgment, new needs of the plaintiff arise and present needs are extinguished." The lump sum system therefore may under-compensate (e.g. where unforeseen medical complications occur) or over-compensate (e.g. where the plaintiff makes a speedy recovery or dies shortly after judgment and his estate succeeds to the proceeds). Where there is a chance of the occurrence of an identifiable future event, an award discounted by the probability of occurrence is certain to be either too high or too low in the

individual case. Another aspect of the same matter, also apparent in Dickson J.'s words, is the dissatisfaction felt by judges in facing the impossible task of estimating, accurately, the plaintiff's future needs. Additional support for periodic payments is found in the argument that the claimant does not really suffer any loss until it is actually incurred. Perfect compensation, therefore, will be compensation of the plaintiff's actual losses as they accrue.

2. Comparison with Social Security Programmes

Comparison with Social Security programmes lends support to these considerations. Welfare, unemployment insurance and workers' compensation programmes have adopted periodic payments as the standard medium of compensation. To those who see the tort system as a kind of accident compensation scheme funded by liability insurance, the comparison with social loss compensation schemes has cogency.

3. The Present System Causes Delay by The Plaintiff in Litigation

The argument here is that a once-and-for-all system of damage assessment compels the plaintiff to delay the trial as long as possible in order to gather the best possible evidence of the long term effects of his injury. If the plaintiff knew that the assessment could be re-opened if unexpected complications ensued, he would have no incentive to delay: prompt trials would be in the interests of both parties and in the interests of the courts. Against this, however, must be set the costs of review procedures under any periodic payments system permitting subsequent adjustments.

4. The Present System Delays The Plaintiff's Rehabilitation

The argument is that because it will pay the plaintiff to prove at trial that his injuries are serious, he will not seriously attempt to rehabilitate himself before trial. Against this argument must be set the consideration that with a system of periodic payments liable to be reduced if the plaintiff regains health, the plaintiff will have an indefinite incentive against rehabilitation.

5. The Present System Deprives The Plaintiff of Compensation Immediately After The Accident when He May Need It Most

The delay caused by the once-and-for-all system (point 3, above) means that the plaintiff must do without compensation for months, and perhaps years, after the accident. Compensation at an early date is a humane provision to a seriously injured person and an important tool of rehabilitation. The force of this consideration has been significantly reduced in automobile accident cases by the scheme of "no fault" benefits. The recent amendment to *The Judicature Act* providing for prejudgment interest will also doubtless encourage insurers to make advance payments.

6. "Compensation Neurosis"

A system of adjustable periodic payments would eliminate or reduce the anxiety and, hence, the deleterious effect on the plaintiff's mental health of his whole future support depending on a single proceeding.

7. The Present System puts Undue Pressure on The Plaintiff to Settle

As mentioned above in para. 5, the long delay before trial means that the plaintiff will not have full compensation for some time after the injury. The defendant is certain to take advantage of this need in settlement negotiations, and it will be an advantage taken at the expense of those least able to afford it (i.e., those plaintiffs whose need is the most pressing).

8. Tax Calculations

The present system requires complex calculations of the incidence of income tax in a fatal accident claim with an initial reduction in respect of the deceased's liability to income tax and then a "grossing up" to allow for the incidence of income tax on the plaintiff's investment income.[8] The need for these calculations in fatal cases would be eliminated if periodic payments could be ordered, leaving it to Parliament to determine the incidence of taxation, if any.

9. Income Tax Advantages of Periodic Payments

A different point is the potential tax advantage to the claimant of tax-free periodic payments as opposed to a lump sum to be invested to produce (taxable) income.

It appears that voluntarily agreed schemes of periodic payments (known as "structured settlements") have an important income tax advantage, in that Revenue Canada has been willing to treat receipts under such settlements as tax-free in the plaintiff's hands, whereas, if the plaintiff accepted a lump sum and purchased an annuity, tax would be payable on the interest element in the annuity payments. It is unnecessary to stress the point that in times of high interest rates the difference in tax treatment is very substantial, and the benefit can, in effect, be divided between the parties in settlement negotiations.

We were interested to discover whether the same tax benefits would attach to periodic payments ordered by the court and, accordingly, commis-

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[8] See *Keizer v. Hanna*, [1978] 2 S.C.R. 342. Somewhat different considerations apply in personal injury claims, as medical expenses are deductible in part from income tax (see *Fenn v. City of Peterborough* (1979), 25 O.R. (2d) 399, at 456), and compensation for loss of earning capacity is calculated without deduction of tax that would have been payable on the plaintiff's earnings. See *R. v. Jennings*, [1966] S.C.R. 532, *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, at 259, *per* Dickson J.

sioned an opinion on this question, which is attached to this report as Appendix C. The opinion indicates that periodic payments ordered by the court would probably be treated as tax free in the hands of the judgment creditor. We considered, therefore, that a substantial advantage could be obtained by both parties from a provision empowering the court to order periodic payments at least on consent.

10. Periodic Payments Would Avoid the Distasteful Necessity of Assessing A Widow's (or Widower's) Prospect of Remarriage in Fatal Accident Claims

The argument is that periodic payments would simply be awarded, and would cease or be reduced if the claimant later remarried. It is hardly necessary to point out that this scheme opens up the even more distasteful prospect of setting up an economic disincentive to remarriage. A scheme whereby periodic payments were varied on "de facto" remarriage might solve this particular problem but would invite all the difficulties associated with monitoring and "snooping" into the plaintiff's private life.

11. Dissipation of Awards

An argument commonly made in favour of a change from the present system is that plaintiffs tend to squander the proceeds of their judgments. The point raises the question of whose money is the award. If it really is the plaintiff's money, and the plaintiff is of full age and understanding, it is difficult to object to his doing what he likes with it. However, if the tort system is viewed as an accident compensation scheme funded indirectly by the public through liability insurance premiums (now compulsory for motorists in Ontario), dissipation of judgment proceeds is a matter of public concern, especially as the plaintiff, if he leaves himself destitute, will be thrown upon the public purse for support by the social welfare system. Another point is that there are degrees of competence and there may be a case for controlling disposition of a large judgment sum even in the hands of a claimant whose condition would not justify an order under *The Mental Incompetency Act*.[9]

12. Protection Against Inflation

It is said that periodic payments provide a better protection than lump sum awards against inflation. This depends on what system of cost of living indexing is employed for a periodic payment system. If periodic payments are inadequately indexed, the plaintiff would be better off with a lump sum that could, at least in theory, be invested to give protection against the decline in value of money.[10] A periodic payment system fully indexed

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[9] R.S.O. 1970, c. 271.

[10] Twelve American States have adopted periodic payment provisions in some medical malpractice cases, but almost all exclude any possibility of subsequent variation. See

against inflation would certainly offer an attractive alternative to the present system, but it is not easy to see how such a system could be financed without state participation of some sort.[11]

ARGUMENTS AGAINST PERIODIC PAYMENTS

1. Lack of Finality

The well-known maxim: "interest reipublicae ut sit finis litium" undoubtedly has force, though against the interest in finality must be weighed the interest of the plaintiff in a full and fair assessment of the damage caused by the defendant's wrong, and reasonable assurance of receiving just compensation for it.

Any system of periodic payments adjustable in the light of changing circumstances will involve the direct costs of the review process. The burden on the court of hearing applications to vary awards and appeals from variations could be expected to be considerable. The costs to the parties of legal representation and of assembling and presenting the necessary evidence must also be taken into account. Expert witnesses would almost always be required on both sides whenever a change in medical condition was alleged.

Applications for variation could be expected in respect of changes in the value of money, changes in costs not reflected in the change in value of money, and changes in the claimant's actual needs. A formula could be envisaged that would automatically vary the claimant's award according to some predetermined measure of the change in the value of money. Such a change, however, would almost never exactly match the claimant's actual costs. In principle, therefore, a search for perfect compensation would require a hearing to determine the amount of each loss as it accrued. Changes in the claimant's needs should require similar treatment. Convenience would, presumably, demand some time period between assessments; perhaps annual hearings would be the most frequent feasible with provision for interest to be paid on any money owing from the date of accrual of the loss until actual payment.

The burden of re-hearings might be reduced by setting some threshold requirement, for example, that only substantial changes in costs or in needs would be considered. Such a proposal raises considerable difficulties, however, in finding a satisfactory definition of "substantial changes". If the phrase is undefined, litigation will be required in each case to determine if

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Elliget, "The Periodic Payment of Judgments", [1979] Ins. Counsel J. 130. These provisions were enacted hastily in what was perceived as a "medical malpractice crisis". Their constitutionality is in question. See *American Bank & Trust Co. v. Community Hospital*, 163 Cal. Rptr. 513 (1980).

[11] The French system is financed by a State-run reinsurance scheme.

the case can be re-opened. If defined, for example, in dollar or percentage figures, it will give rise to anomalies and injustice in depriving claimants of a variation where the change falls short of the specified figure and a tendency to inflate claims in order to trigger the threshold.

One possibility sometimes discussed is to make variation dependent on the occurrence of a specified event mentioned at trial. This proposal was adopted by the English Law Commission.[12] It would certainly reduce the burden of continual re-assessment, but might give rise to its own anomalies. Everything would depend on the exact words used by the trial judge in defining the circumstances that would permit review. "The plaintiff may apply for a re-assessment if he develops epilepsy" might not cover the case of the plaintiff developing a brain tumor. One could foresee a tendency on the part of trial judges to define very broadly the circumstances that would permit review. Such a tendency would lead to the difficulties mentioned above, and would only make more anomalous those cases where review was denied.

The burden of review would be reduced by a provision that application could only be made once, or only once in a long period of time, or only within a certain period of time following a judgment,[13] but such systems would have most of the deficiencies of the present one.

2. Loss of Incentive to Rehabilitation

A point very commonly made against a variable system of periodic payment is that if it paid the claimant to remain disabled, some claimants (at the margin, at least) will tend to remain disabled, whereas with compensation settled, they might achieve more rapid rehabilitation. It is not necessary to support this argument with accusations of malingering. It is enough to say that, perhaps subconsciously, some claimants will tend to remain in a state of health that will be financially advantageous.

Supporters of a change from the present system generally concede this point, but consider it to be offset by the ill effects on the plaintiff's health of the present system.[14] Another point that can be made is that malingering, or its psychological equivalent, has not proved an insuperable obstacle to periodic payments in social security schemes, such as Workers' Compensation.

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[12] Law Com. Report on Personal Injury Litigation—Assessment of Damages, No. 56, 1973, pp. 64-65.

[13] Article 296 of Book V of the proposed Quebec Civil Code would permit review within five years of judgment or settlement if the creditor's position "subsequently worsened substantially."

[14] Pearson Commission Report, para. 571.

3. The Defendant (or His Insurer) will be Encouraged to Snoop into the Plaintiff's Private Life

This point may be considered, like the last, to be an aspect of loss of finality. If it will pay the defendant to prove that the plaintiff is less disabled than he claims or that he is earning more than he admits, it may pay the defendant also to investigate the plaintiff's affairs in search of evidence. This prospect would be particularly distasteful in fatal accident claim cases if the claim for lost support were to be diminished by the claimant's obtaining support from other sources. Any system whereby a claim to support were to cease on the claimant's "de facto" marriage, would run into this difficulty. Loss of the claim on actual remarriage would not run into the same objection, but would be open to the objection that it discouraged actual remarriage in favour of "de facto" marriage relationships. Against these arguments, insofar as they apply to personal injury claims, can be made the point that snooping by insurers has not proved to be an unmanageable problem in the case of long-term disability insurance, where the same incentives exist.

4. The Claimant is Deprived of His Preferred Result

The argument here is for freedom of choice. The plaintiff can always purchase an annuity if he wishes to do so, with the proceeds of a lump-sum judgment or otherwise invest it to produce periodic income. Moreover, the plaintiff can agree on a "structured" settlement and this is being done with increasing frequency. It is argued that there is no justification for compelling the plaintiff to accept an annuity and that the net effect may be to lower the plaintiff's bargaining power in settlement negotiations, leaving the plaintiff who prefers a lump sum simply with a smaller lump-sum settlement than he would obtain under the present system. The strength of this argument depends on the weight to be accorded the arguments mentioned earlier that the plaintiff does not really suffer a loss until it accrues, that the proceeds of the judgment are funded indirectly by the public in the form of liability insurance premiums, and that it is consequently justifiable for the state to restrain dissipation of a lump sum award.

5. Insurers Are Unable to Close Their Books or to Estimate Their Liabilities

As is clear from the response to our letter to insurers, this is an important concern to the insurance industry. The argument is that insurance losses must be capable of estimation with reasonable certainty in order to calculate appropriate premiums. "Open-ended" liability prevents this calculation.

Against this argument it may be said that insurers, better than anyone else, should be able to estimate the value of uncertain future events. Where the uncertainty is the length of the claimant's life, it must surely be conceded

that there can be no actuarial difficulty. Where the uncertainty is the future state of the claimant's health, it can be argued that cases where health improves unexpectedly will balance those where it deteriorates. The force of this argument depends on the weight to be given to the point made earlier about the claimant's tendency to malinger (deliberately or subconsciously)—a problem from the insurance point of view of "moral hazard".

In respect of inflation, insurers commonly say that only the government can afford a fully inflation-proofed pension. This argument appears to have force but could be met in several ways; for example, by a state-run reinsurance scheme of which various forms are possible, or by a cost of living increase in the periodic payments not to exceed a standard measure of interest rates, e.g. the Government of Canada Treasury Bill rate, readily available to a prudent investor.

6. In Respect of Future Lost Earnings Justice Requires an Injured Plaintiff to Receive a Lump Sum

The argument here is that the plaintiff who is disabled loses a capital asset, and that he ought to have the option of receiving a capital sum in compensation so that, for example, a disabled carpenter might set up in the construction business. This argument is supported by the Supreme Court of Canada in *R. v. Jennings* and by the House of Lords in *Pickett v. British Rail Engineering Limited*, [1978] 3 W.L.R. 955, both cases holding that a claim for future lost earnings is equivalent to a claim for a capital asset and represents a present loss. In answer to these points, it may be argued that a periodic payment scheme could make allowance for the commutation of periodic payments to a lump sum on good cause shown by the claimant.

7. Future Medical Expenses are already Subject to Subrogation in Favour of O.H.I.P.

Since O.H.I.P. is subrogated to the portion of the claim for future medical expenses that fall within the coverage of the health insurance scheme,[15] there can be no question of the plaintiff dissipating this portion of the award or of the plaintiff being over-compensated or under-compensated, since he will receive what he needs from O.H.I.P.—no more and no less. It would be most inconvenient, therefore, to contemplate periodic reviews of this portion of the award, and very wasteful to conduct reviews to adjust accounts between O.H.I.P. and the defendant's insurer according to changes in the plaintiff's state of health. It would be even more anomalous to contemplate such reviews in the case of an uninsured defendant. All considerations seem to point to the advantages of a lump sum settlement in favour of O.H.I.P.

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[15] *The Health Insurance Act, 1972*, S.O. 1972, c. 91, s. 35(1). By agreement between O.H.I.P. and many insurers, the right of subrogation in automobile cases is given up in return for a payment by the insurer.

8. Only a Comparatively Small Area Remains which a Periodic Payment Scheme would Apply

If points 6 and 7 are soundly based, we will have excluded a substantial portion of most personal injury awards and will be left only with claims for future pain and suffering and loss of amenities (limited to a conventional maximum)[16] and claims for the cost of future care not covered by O.H.I.P. The argument is that it is hardly worth the effort of introducing a major change in the present system when the change will have no effect on most of the damages awarded in respect of future losses caused by personal injury.

9. Periodic Payments put an Undue Burden on the Uninsured Defendant

Although many defendants are adequately insured against liability for personal injuries, some are not. Even with compulsory automobile insurance, the low statutory minimum ($100,000.00) means that many motorists will be under-insured. When it is recalled that modern tort law (judicial and statutory) may impose liability without any finding of real fault (e.g. vicarious liability of the owner of an automobile who lends it to a friend) it must surely give us pause to contemplate burdening an innocent defendant with a perpetual open-ended liability. It would, as the dissenting Pearson commissioners commented,[17] make the plaintiff the defendant's pensioner for life. It is true that approximately such a result is effected in matrimonial support cases, but the justification here is presumably what is still regarded as the life-long commitment of marriage. It seems doubtful whether the concept should be extended to a tortfeasor, especially one who is not, in any real sense, at fault. The point is strengthened by a contemplation of the effect of inflation-proofed periodic payments. A relatively modest award of $20,000.00 per annum to a person disabled by an accident would, if indexed at a 10% annual rate of inflation with yearly rests, rise to $57,062.00 in the twelfth year for a total payment at the end of that year of $427,684.00. The impact of such a liability on an uninsured defendant whose after-tax income was rising at a slower rate than the rate of inflation, would be devastating, and bankruptcy would provide no relief if, as would seem probable, the obligation to make payments were held to accrue periodically. Supporters of periodic payments might make the point that the impact of a judgment on a defendant should be irrelevant to the proper assessment of compensation; however, the practical considerations mentioned here cannot be ignored.

10. The Plaintiff Can Evade Any Periodic Scheme by Making a Lump Sum Settlement

The point here is that unless lump sum settlements are controlled, a claimant will be free, even if periodic payments are introduced, to settle his

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[16] See *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, *Arnold v. Teno*, [1978] 2 S.C.R. 287, *Thornton v. School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267 ($100,000); *Lindal v. Lindal*, [1978] 4 W.W.R. 592 (B.C.S.C.) ($135,000); *Fenn v. City of Peterborough* (1979), 25 O.R. (2d) 399 (C.A.) ($125,000).

[17] Pearson Commission Report, para. 621.

claim for a lump sum. Thus, the rationale for periodic payments that depends on the desirability of preventing the plaintiff from dissipating his award loses most of its force if the plaintiff can evade the control by settling for a lump sum and dissipating that. The net effect may be that the plaintiff who prefers a lump sum will simply be induced to settle for a smaller sum. There are two major arguments in favour of periodic payments, prevention of dissipating of awards, and the securing of more exact compensation. Unless the settlement point can be met, the first argument loses much of its force. The second, however, stands, and a periodic payment system could rationally be supported on that ground alone, if other objections could be satisfactorily answered.

It is not easy to see an answer to the settlement point, unless we were willing to contemplate the control (for example, by the court) of all settlements. This would cause a heavy administrative burden and would probably be resisted by the profession and perhaps by the public as an undue restriction on the freedom of plaintiffs and defendants to settle their own litigation. The Pearson Commission conceded this point, merely imposing a duty on the plaintiff's adviser to point out the advantages of periodic payments before agreement to a lump sum settlement.[18] Of course, if the periodic payment scheme were sufficiently attractive, plaintiffs would be expected to elect periodic payments, but so long as lump sum settlements are allowed, it cannot be a major justification for periodic payments that the plaintiff will be prevented from dissipating the proceeds of his judgment.

11. The Problem of Fixed Dollar Insurance Limits

Inflation-proofed periodic payments are not easily compatible with fixed dollar limits on liability insurance. Consider the example mentioned above of an award of $20,000.00 per annum for lost income. Let us suppose that the disabled person is a man aged 22 and that his life expectancy is not affected by the disability. Under current practice, such an award would be calculated by finding the plaintiff's life expectancy to retirement age (40 years) and then finding the present value of $20,000.00 per annum for 40 years at a discount rate of, say, 2 1/2% (about $511,400.00). Deduction would then be made for adverse contingencies, such as sickness and loss of employment, etc. With even slight deductions for contingencies, the award would be within the limits of a $500,000.00 insurance policy such as is carried by many responsible motorists. Consider, now, the effect of a $20,000.00 per annum periodic payment for the plaintiff's life indexed to inflation at 10% (higher rates of inflation are not beyond contemplation). Unless the insurer were required to set aside and invest the sum of $500,000.00 in the first year for the benefit of the insured, the $500,000.00 limit would be eaten up in thirteen years, and the payment required in the fourteenth year would exceed the policy limit by $59,498.00, sufficient to put many defendants into bankruptcy. Unless future payments were held to

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[18] Pearson Commission Report, paras. 577-78.

be discharged by the bankruptcy, the defendant would then be left with liability for ever-increasing payments for a further 26 years. It may be said in reply to this point that insurance practices would have to change to accommodate a system of periodic payments. It is doubtful, however, whether this accommodation could be left to chance. Probably, periodic payments would have to be introduced with accompanying legislation to have immediate effect on existing and future insurance policies. The American model Periodic Payment of Judgments Act meets this point by including a provision in the model legislation that deems full liability of the defendant to be within the policy limits if the capitalized value of the award is less than the amount of the policy limit. A provision along these lines would have to be included in any scheme proposed for Ontario, though the capitalization formula would be far more complex than that in the Periodic Payment of Judgments Act, if the defendant's liability were "open-ended", i.e., subject to uncertain increases in the future. A scheme limited to motor vehicle accidents could meet the point by requiring compulsory insurance without limit, as in England and other countries. This possibility, however, was outside the Committee's terms of reference, and would require careful consideration and wide consultation.

12. Problems Associated with The Plaintiff's Death

Two questions arise from the possibility of the death of a plaintiff in receipt of periodic payments. It should be noted that death may be caused either by the accident itself for which the defendant is responsible, or by independent causes. First, what portion of the unpaid judgment passes to the plaintiff's estate? Second, what rights have dependants under Part V of the *Family Law Reform Act*? If the present view of the courts is soundly based, that the claim of an injured person for lost future earnings represents a present capital loss to him, the right to recover compensation for that loss ought, in principle, to pass to the plaintff's estate, as held by the House of Lords in *Pickett v. British Rail Engineering Limited*, and in the more recent case of *Kandalla v. British European Airways Corp.*, [1980] 2 W.L.R. 730 (Q.B.). The result would be that the capitalized value of the unpaid portion of the periodic payments representing lost earnings should pass to the plaintiff's estate, and this result should ensue whatever the cause of the plaintiff's death. The reason has nothing to do with the defendant's responsibility for the *death*. In order to preclude the necessity of later hearings to determine the appropriate recovery to the estate, provision would have to be made in any periodic payment scheme for the trial court to indicate the findings of fact necessary to enable the calculation to be easily made on the plaintiff's death (that is, life expectancy, contingencies and annual loss).

The second question, that of the rights of the dependants, requires a different answer. The dependants' claim arises only if the defendant is responsible for the death. A separate hearing would, therefore, be required, in case of dispute, to determine both the value of the lost dependancy and the defendant's responsibility for the death. The Pearson Commission accepted this necessity even though recognising that "this would be a

departure from the usual rule that more than one action should not be brought for the same injury".[19] If the basic periodic payment scheme were to be extended to fatal accident cases, the award would then be payable to the dependants as periodic payments; otherwise, as a lump sum, which would require capitalization.

13. The Need for Adequate Security

Provision would have to be made in any periodic payment scheme for the defendant to put up security. In the absence of such security, the plaintiff should have the option of taking a lump sum judgment and seeking to enforce it immediately.

14. Assignment of Rights to Periodic Payments

If one object of the periodic payment scheme is to prevent the plaintiff from dissipating an award, provision would have to be made in any periodic payment scheme to prevent assignment by the plaintiff after judgment of his rights to periodic payments, except as security for the provision of health care and, perhaps, for certain other purposes (for example, legal fees related to the claim and family support). This would not be a difficult concept to accept, as wage assignments have long been prohibited in Ontario (except to credit unions) and O.H.I.P. will be subrogated to a substantial portion of the judgment representing future cost of medical care. A related question is whether periodic payments should be exempt in whole or in part from claims of creditors. Alternative views are tenable on this question. It is arguable that seizure should be permitted to the extent that wages can be attached, and that there should be an exception for family support obligations.

15. Procedural Changes would be Required to Require Trial Courts to make Specific Findings on Relevant Matters

Specific findings would be required of the precise components of the periodic payments award for purposes of capitalising the award or the remaining part of it, or the lost earnings portion of it, in the event of a failure of the defendant's security, or of the plaintiff's death, or of the commutation of the award to a lump sum for other good reason, if that were permitted, and for rational calculations of adjustments to portions of the award in the light of changing circumstances. Provision would have to be made, therefore, for the trial judge, in case of trial by judge alone, to make specific findings of the relevant facts, and for the jury, in case of trial by jury, to answer detailed interrogatories to a similar end.

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[19] Pearson Commission Report, para. 593.

16. Periodic Payments are Less Suited to Fatal Accident Cases than to Injury Cases

Even if the arguments for periodic payments in personal injury cases are accepted, the case for extending the system to fatal cases is a weaker one, for the lapse of time will never resolve the uncertainties of the deceased's future. However, the recipient would still have the benefits of whatever protection the scheme might give against inflation, and of the income tax advantages of periodic payments.

THE COMMITTEE'S CONCLUSIONS

Some of the arguments against periodic payments considered above are relatively minor. Certainly, if such a scheme were thought desirable, problems of security, assignment, and the form of the judgment would not be insuperable obstacles. However, other arguments are substantial.

We agree with the Pearson Commission that control of voluntary settlements would be neither justifiable nor practicable.[20] Consequently, plaintiffs would remain free to settle their claims for a lump sum and to dissipate the proceeds, even if a periodic payment scheme were introduced. Subject, therefore, to the limited recommendation made below, we do not consider that restraint on the disposition of awards can be adopted as a sufficient reason in itself for instituting a system of periodic payments.

The other major argument for periodic payments is that it yields more perfect compensation than the present system. We accept that this is so but consider, briefly speaking, that the benefits of perfect compensation are outweighed by the loss of finality. In particular, we do not see an easy solution to the problems of fixed dollar insurance limits and of the burden of variable periodic payments on the uninsured defendant. We are also persuaded that the direct costs to the State and to the parties of the review process required by variable payments would be high. The parties would also have to bear the cost of the uncertainty introduced by variable periodic payments.

One possible solution that has been suggested to some of these problems involves the creation of some sort of fund to which the defendant would pay a lump sum and from which the plaintiff would draw periodic payments.[21] This proposal, however, would involve the creation of some sort of Board or Tribunal to administer the fund. The solvency of the fund would require State assurance. Even though, in theory, the gains and losses to the fund would even out in the long term, we consider that in practice,

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[20] Pearson Commission Report, para. 577.

[21] See Feldthusen and McNair, "General Damages in Personal Injury Suits: The Supreme Court's Trilogy" (1978), 28 U. Toronto L.J. 381, at 425.

partly because of the "moral hazard" problem referred to earlier, the creation of such a fund would put a burden on public funds. We are not convinced that it would be desirable to create what would, in effect, be a State-run insurance agency operating in one small field of personal injury compensation.

For these reasons, we have rejected any general scheme of variable periodic payments that would be imposed on the parties against their will. However, we see no objection to the entering of a reviewable judgment on consent of the parties as has, in fact, been done in the past.[22] As there is some doubt about the basis of such a judgment in the existing Rules, we recommend an amendment to make it clear that the court has power, on consent, to enter such a judgment.

Secondly, and for similar reasons, we see no objection to a judgment for periodic payments with the parties' consent. We see potential advantage to both parties in the shape of income tax savings,[23] and we accept that there is a need for this possibility to be made explicit, so that parties can obtain on judgment the same income tax advantages that are available on voluntary settlement. We recommend that the Rules be amended accordingly.

Thirdly, we consider that there is a case to be made for restricting the plaintiff's disposition of an award in certain very limited circumstances. Cases arise in which the plaintiff, though not mentally incompetent, is plainly incapable of managing a large sum of money. In borderline cases, it would often be distressing to the plaintiff to have proceedings brought under the *Mental Incompetency Act*, and if the only need is to restrain disposition of a single award, it is surely too stark a choice to compel an election between no restraint at all, and the institution of mental incompetency proceedings. The judge who has seen the plaintiff in the witness box can, we consider, in the limited class of cases contemplated, make a decision on such a question. Although we contemplate that the power would only be exercised in "near-incompetency" cases, we do not consider it desirable expressly to limit the judge's power by the use of such a phrase. We consider that the exercise of the power can safely be left to the judge's discretion. We would limit this recommendation to the portion of the judgment representing the cost of future care, and, since a substantial portion of these costs is in any case subject to subrogation in favour of O.H.I.P. it will be seen that the recommendation is a very restricted one. We accept also, as stated above, that voluntary settlements cannot be controlled, so it will be seen that the power that we contemplate will only rarely be exercised in a very limited field. We consider, however, that such a power would be useful in the limited circumstances described. The Committee was informed by the Public Trustee that judges have several times in the past few years ordered judgments to be paid to the Public Trustee to be invested for the plaintiff in such

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[22] See *Steeves v. Fitzsimmons* (1975), 11 O.R. (2d) 387 (H.C.).

[23] See pp. 7-8 above [reproduced *supra* at 263-64], and Appendix C, below. [Appendices not reproduced.]

cases. We recommend that the Rules be amended to provide clear authority for this practice.

We are conscious that these are modest proposals, but we think it wise to proceed with caution. We recommend that the proposed new Rules should be reviewed after a period of five years with a view to their possible extension at that time.

SUMMARY OF RECOMMENDATIONS

We recommend the following additions to the Rules:

A. An award of damages may, in cases of wrongful death or personal injury, in the court's discretion and on consent of all parties, be made open to review on such terms and in such circumstances as the court may consider just.

B. The court may, in cases of wrongful death or personal injury, with the consent of all parties to an action, order the defendant to pay damages periodically on such terms as the court considers just.

C. (i) The court may, in its discretion, order a defendant to pay any part of a judgment sum representing the cost of future care of an injured plaintiff to the Public Trustee, the Accountant of the Supreme Court or such other person as the court may approve, to be invested on behalf of the plaintiff and paid out to or for the plaintiff at such times and in such circumstances as the court may order.

(ii) Any order made under subsection (i) may be rescinded or varied at any time on application to the court by the judgment creditor.

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The Honourable Mr. Justice Richard E. Holland, Chairman

J. Roderick Barr, Q.C. — Earl A. Cherniak, Q.C.

His Honour Senior Judge N. Douglas Coo

Stephen B. McCann — Brendan O'Brien, Q.C.

Theodore H. Rachlin, Q.C.

APPENDIX 6

ONTARIO LAW REFORM COMMISSION

COMPENSATION FOR PERSONAL INJURIES AND DEATH PROJECT

LIST OF RESEARCH PAPERS

1.	Bale:	Cost of Future Care, Periodic Payments, Structured Settlements, Discounting, Taxation and Gross-up
2.	Dunlop:	Non-Pecuniary Loss and Exemplary Damages
3.	Feldthusen:	Research Paper
4.	Rea:	An Economic Perspective
5.	Reaume:	Compensation for Loss of Working Capacity

Note: It is proposed to deposit the Research Papers in the Legislative Library of Ontario.

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